LIBRARY
SUPREME COURT, U. S.

FILED
JUN 14 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 244

ERNESTINE W. HUNT,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BEAUFORD JAMES GEORGE, JR.
1133 Avenue of the Americas
New York, New York 10036
CLARK SHANAHAN
310 West Main Street
Owosso, Michigan 48867
Attorneys for Petitioner

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3-6
Reasons Relied on for the Allowance of the Writ	6-20
Point I—Arizona Rule of Criminal Procedure 231B, permitting trial *in absentia* of a felony defendant "voluntarily" absent throughout the proceedings, conflicts with due process of law as previously construed in the applicable decisions of this Court, and presents a substantial federal question not heretofore determined by this Court	6-8
Point II—Assuming waiver of the constitutional rights of presence, confrontation, and counsel from a refusal to waive extradition, as the Court of Appeals did below, conflicts with due process of law as previously construed in the applicable decisions of this Court, and presents a substantial federal question not heretofore determined by this Court	9-12
Point III—Whether the authority of *Sweeney v. Woodall* has been eroded by later decisions of this Court to the point that it should be overruled, confirming the power of a federal district court to grant habeas corpus in the asylum state for clear constitutional error in demanding state procedures, presents a substantial federal question not heretofore determined by this Court	13-18

Page

Point IV—Whether the demanding state can intervene in a federal habeas corpus proceeding, especially when that intervention is untimely, presents a substantial federal question that should be resolved by this Court..... 19-20

Conclusion 21

Appendix A

Opinion of the United States Court of Appeals for the Sixth Circuit..... 23-44

Opinion of the United States District Court for the Eastern District of Michigan..... 44-62

Opinion of the Supreme Court of Michigan.... 63-64

Opinion of the Court of Appeals of Michigan... 64-66

Opinion of the Circuit Court of Jackson County, Michigan 67-72

Appendix B

United States Constitution, Art. 4, Sec. 2, cl. 2 73

United States Constitution, Amendment XIV, Sec. 1 73

Federal Rule of Civil Procedure 24..... 74-75

Federal Rule of Criminal Procedure 43..... 75

28 U.S.C. Sec. 2243..... 76

Arizona Rule of Criminal Procedure 231..... 77

Arizona Rule of Criminal Procedure 250..... 78

Michigan Compiled Laws Annotated Sec. 780.4 (1968) 79

Michigan Compiled Laws Annotated Sec. 780.9 (1968) 79-80

INDEX OF AUTHORITIES

Table of Cases Cited

	Page
Ahrens v. Clark, 335 U.S. 188 (1945)	19
Barber v. Page, 390 U.S. 719 (1968)	10
Brookhart v. Janis, 384 U.S. 1 (1966)	7, 9, 10
Bruton v. United States, 391 U.S. 123 (1968)	7
Burgett v. Texas, 389 U.S. 109 (1967)	10
Carafas v. LaVallee, 391 U.S. 234 (1968)	15
City of Philadelphia, Pennsylvania v. Morton Salt Co., 385 F.2d 122 (3d Cir. 1967)	20
Diaz v. United States, 223 U.S. 442 (1912)	8
Douglas v. Alabama, 380 U.S. 415 (1965)	7
Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D. Ark. 1953)	19
Ex parte Fudera, 162 Fed. 591 (C.C. S.D. N.Y. 1908)	18
Ex parte La Mantia, 206 Fed. 330 (S.D. N.Y. 1913)	18
Fay v. Noia, 372 U.S. 391 (1963)	9, 10, 14, 15
Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959)	18
Garrity v. New Jersey, 385 U.S. 493 (1967)	10
Gault, In re, 387 U.S. 1 (1967)	7, 9
Hunt, In re, 276 F. Supp. 112 (E.D. Mich. 1967)	2, 13, 14, 18, 19
Johnson v. Zerbst, 304 U.S. 458 (1938)	9

	Page
Koch v. O'Brien, 101 N.H. 11, 131 A.2d 63 (1957)	14
McNally v. Hill, 293 U.S. 131 (1934)	16
Murray v. Burns, 48 Hawaii 508, 405 P.2d 309 (1965)	13-14
Ornelas v. Ruiz, 161 U.S. 502 (1896)	19
Pate v. Robinson, 383 U.S. 375 (1966)	7, 9
Peyton v. Rowe, 391 U.S. 54 (1968)	16, 17
Pointer v. Texas, 380 U.S. 400 (1965)	6
Powell v. Alabama, 287 U.S. 45 (1932)	7
Roberts v. LaVallee, 389 U.S. 40 (1967)	15
Roberts v. Reilly, 116 U.S. 80 (1885)	12
Sibron v. New York, 392 U.S. 40 (1968)	16
Simmons v. United States, 390 U.S. 377 (1968)	11
Smith v. Illinois, 390 U.S. 129 (1968)	7
Snyder v. Massachusetts, 291 U.S. 97 (1934)	6
Spevack v. Klein, 385 U.S. 511 (1967)	10, 11
State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965)	3
Sweeney v. Woodall, 344 U.S. 86 (1952)	13
United States v. Jackson, 390 U.S. 570 (1968)	11

Statutes Cited

United States Constitution

Art. 4, Sec. 2, cl. 2 ..... 3, 12, 17

Amend. 14, Sec. 1, cl. 2 3

	Page
Federal Rule of Civil Procedure 19	19
Federal Rule of Civil Procedure 24	3, 4, 19, 20
Federal Rule of Criminal Procedure 43	3, 8
18 U.S.C. Sections 3184, 3186-3195	19
28 U.S.C. Sec. 1254(1)	2
28 U.S.C. Sec. 1404(a)	19
28 U.S.C. Sec. 2241(c)(3)	19
28 U.S.C. Sec. 2241(d)	19
28 U.S.C. Sec. 2243	3, 15, 19, 20
Arizona Rule of Criminal Procedure 231	3, 4, 8
Arizona Rule of Criminal Procedure 250	3
Michigan Compiled Laws Annotated Sec. 780.4 (1968)	3, 4
Michigan Compiled Laws Annotated Sec. 780.9 (1968)	3, 4

Secondary Authorities Cited

Supreme Court Rules Advisory Committee Note to Rule 24	19
Note, *Multiparty Habeas Corpus*, 81 *Harv. L. Rev.* 1482 (1968)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ERNESTINE W. HUNT,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ernestine W. Hunt, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit holding that petitioner is returnable to Arizona on extradition for sentencing on a felony conviction flowing from her retrial *in absentia*.

OPINIONS BELOW

The opinion rendered by the Honorable Talbot Smith, District Judge, United States District Court for the Eastern District of Michigan, is reported as *In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967). The opinion of the United States Court of Appeals for the Sixth Circuit, of April 4, 1969, has not yet been published.

JURISDICTION

The order sought to be reviewed was made and entered on April 4, 1969. A stay of mandate is in effect. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person held for extradition, who has been tried by a demanding state *in absentia* for a felony, is accorded due process of law if a federal district court must deny habeas corpus, thus approving the extradition of the person tried *in absentia*, especially when that person is ineligible for bail.

2. Whether a state statute authorizing a criminal felony trial of a person who is absent from the state is in conflict with the due process clause of the Fourteenth Amendment.

3. Whether the demanding state can intervene in a federal habeas corpus proceeding, especially when that intervention is untimely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 2, cl. 2.

United States Constitution, Amendment XIV, Sec. 1, cl. 2.

Federal Rule of Civil Procedure 24.

Federal Rule of Criminal Procedure 43.

28 U.S.C. Sec. 2243.

Arizona Rule of Criminal Procedure 231.

Arizona Rule of Criminal Procedure 250.

Michigan Compiled Laws Annotated Sec. 780.4 (1968).

Michigan Compiled Laws Annotated Sec. 780.9 (1968).

(For the pertinent text of the above references, see *infra*, Appendix B.)

STATEMENT OF THE CASE

Petitioner, Ernestine W. Hunt, and her husband were convicted in Arizona, in March, 1964, of felonious assault on their daughter. In October, 1965, the Arizona Court of Appeals reversed the conviction. *State v. Hunt*, 2 Ariz. App. 6, 406 P.2d 208 (1965). While petitioner and her husband were on bond pending appeal, they returned to Michigan.

Between February, 1966, and March, 1967, various trial dates were set and then continued because of petitioner's ill health. From mid-February, 1967, until she was arrested for extradition in late March, 1967, petitioner was a patient in a private mental hospital in Michigan. Extradition proceedings were begun by Arizona in mid-March because

of petitioner's failure to leave the mental hospital to return to Arizona. Petitioner was placed on bond by a Michigan court pending extradition proceedings.

After the Arizona Governor's requisition was received by the Michigan Governor, petitioner was granted a governor's hearing under Mich. Comp. L. Ann. Sec. 780.4 (1968). The first hearing was held in early May, 1967, and an adjourned hearing scheduled for the end of May.

After it had commenced the extradition proceedings that resulted in petitioner's arrest and a release on bond pending the governor's hearing, Arizona authorities ordered petitioner tried *in absentia* on the pending Arizona felony charges. This was done over the protest of petitioner's Arizona counsel, on the basis that her failure to return was voluntary within Arizona Rule of Criminal Procedure 231B, so that she had waived her constitutional rights. Trial was conducted in petitioner's absence between April 25 and May 5, 1967, culminating in a jury verdict of guilty.

At the adjourned Michigan governor's hearing at the end of May, 1967, the facts that petitioner had been convicted *in absentia* of a felony and that she was presently sought not for trial but for sentencing were communicated to Michigan authorities. Nevertheless, they ordered petitioner returned to Arizona for sentencing.

Petitioner then exercised her right to state habeas corpus review of the governor's decision, under Mich. Comp. L. Ann. Sec. 780.9 (1968), in the Circuit Court for Jackson County, Michigan, where she was taken into custody. Petitioner was placed on bond during the pendency of the habeas corpus proceedings, between the end of May and mid-July, 1967. The Michigan Circuit Court then denied petitioner's application and cancelled her bond. Petitioner appealed both the denial of the writ and the refusal of bond

pending appeal to the Michigan Court of Appeals. When that court affirmed the action of the Circuit Court in late August, 1967, leave to appeal to the Supreme Court of Michigan was sought but denied in early September. Throughout this period petitioner was hospitalized under guard for certain serious physical ailments.

An application for habeas corpus was made to the United States District Court for the Eastern District of Michigan immediately after exhaustion of Michigan appellate remedies. During pendency of the District Court proceedings petitioner remained in confinement as a medical prisoner, for a total period of three months. On October 25, 1967, the District Court granted petitioner's application and released her on bond until Arizona should certify that it would accord petitioner "an expeditious trial under the Federal constitutionally applicable principles."

During November, 1967, Michigan decided not to appeal the District Court judgment. On the last day of the appeals period, November 24, 1967, Arizona moved to intervene under Federal Rule of Civil Procedure 24(a). Intervention for purposes of appeal was granted over petitioner's objection.

Petitioner moved to dismiss the appeal in the United States Court of Appeals for the Sixth Circuit, but the matter was passed for oral argument. On April 4, 1969, the Court of Appeals reversed the District Court judgment and ordered petitioner remanded to Arizona for sentencing on the *in absentia* felony conviction entered against her in May, 1967. A stay has been granted. No rehearing has been sought.

Petitioner asserts that the constitutional principles enunciated by the District Court and rejected by the Court of Appeals are correct, and that this Honorable Court should affirm the District Court judgment and reverse the Court of Appeals' order, for the reasons set forth below.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Point I

ARIZONA RULE OF CRIMINAL PROCEDURE 231B, PERMITTING TRIAL IN ABSENTIA OF A FELONY DEFENDANT "VOLUNTARILY" ABSENT THROUGHOUT THE PROCEEDINGS, CONFLICTS WITH DUE PROCESS OF LAW AS PREVIOUSLY CONSTRUED IN THE APPLICABLE DECISIONS OF THIS COURT, AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

From the time of *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934), this Court has recognized that a defendant has the right to be present at his criminal trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

It has also stated clearly in a series of its recent decisions that the right of confrontation is an integral part of procedural due process. According to *Pointer v. Texas,* 380 U.S. 400 (1965), "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" (380 U.S. at 404), so that the transcript of a preliminary examination at which defendant was present but not represented by counsel could not be

read into evidence at trial without violating the defendant's Sixth Amendment rights incorporated into Fourteenth Amendment due process.

This Court has also held, in *Brookhart v. Janis,* 384 U.S. 1 (1966), that in the absence of a valid waiver it is constitutionally impermissible to enter a judgment of conviction on the basis of "*prima facie* trial" proceedings in which witnesses are not in fact subjected to cross-examination. In juvenile delinquency proceedings that may result in incarceration, it is error to permit a police officer to summarize what the complainant would have said had she been present. *In re Gault,* 387 U.S. 1 (1967).

The right of confrontation extends as well to the refusal to force an informant to disclose his identity on cross-examination, *Smith v. Illinois,* 390 U.S. 129 (1968), to the use of a co-defendant's confession that incriminates the non-confessing defendant as well, *Bruton v. United States,* 391 U.S. 123 (1968), and to the invocation by a witness of the privilege against self-incrimination that frustrates cross-examination by the defendant, *Douglas v. Alabama,* 380 U.S. 415 (1965).

It is also axiomatic since *Powell v. Alabama,* 287 U.S. 45 (1932), that a defendant has the right to the effective assistance of counsel. The duty "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case" (287 U.S. at 71). Counsel cannot be expected to function effectively in the absence of his client, the duty thrust on petitioner's Arizona counsel by the Arizona court. A functional analogy on the relationship of the opportunity to consult counsel and the concept of effective counsel is also found in the doctrine that precludes the trial of one not mentally competent to undergo proceedings, *Pate v. Robinson,* 383 U.S. 375 (1966).

Despite this substantial line of authority from this Court making it clear that an *in absentia* felony trial denies due process of law, the Court of Appeals in apparent reliance on a 1912 decision of this Court, *Diaz v. United States*, 223 U.S. 442 (1912), held that Arizona Rule of Criminal Procedure 231B is the substantial equivalent to Federal Rule of Criminal Procedure 43,[1] that the requirement that "trial has been commenced in his presence"[2] was fully satisfied at petitioner's first trial in 1964, and that petitioner was "voluntarily absent," justifying an *in absentia* proceeding to be conducted with her attorney present in her stead. This, petitioner submits, constitutes the decision of a federal question in clear conflict with applicable decisions of this Court, particularly *Snyder v. Massachusetts; Brookhart v. Janis;* and *Powell v. Alabama.*

---

[1] On its language, Arizona Rule 231B is not the same as Federal Rule 43. With the exception of arraignment and submission of a guilty plea, the Arizona rule permits the court to order all trial proceedings to be held in the defendant's absence if it finds the defendant "voluntarily absent." Federal Rule 43 does not permit trial in the absence of the defendant unless "trial has been commenced in his presence."

[2] Federal Rule of Criminal Procedure 43. The Court of Appeals' statement in petitioner's case, although perhaps dictum, that presence at a first trial would satisfy Federal Rule 43 requirements as far as a later retrial is concerned, has no counterpart in federal case law.

Point II

ASSUMING WAIVER OF THE CONSTITUTIONAL RIGHTS OF PRESENCE, CONFRONTATION, AND COUNSEL FROM A REFUSAL TO WAIVE EXTRADITION, AS THE COURT OF APPEALS DID BELOW, CONFLICTS WITH DUE PROCESS OF LAW AS PREVIOUSLY CONSTRUED IN THE APPLICABLE DECISIONS OF THIS COURT, AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

The position of this Court is clear that before there can be a constitutionally valid waiver of constitutional rights four requirements must be met:

(1). Waiver means "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). It must rest on the "considered choice of the petitioner," *Fay v. Noia,* 372 U.S. 391, 439 (1963). Efforts at relinquishment by an attorney must be acquiesced in, *Brookhart v. Janis,* 384 U.S. 1, 8 (1966). There must also be an actual knowledge of the right in question (and the alternatives), and a realistic opportunity to decide whether to exercise it, *In re Gault,* 387 U.S. 1, 34 n. 54, 41-42 (1967).

(2) The person alleged to have waived a constitutional right must be mentally competent to do so. It was alleged in *Pate v. Robinson,* 383 U.S. 375 (1966), that Robinson had waived his right to raise the competency issue by his failure to demand a sanity hearing. This Court held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial" (383 U.S. at 384). The failure to inquire into the matter deprived

Robinson of his constitutional right to a fair trial. The failure of the Superior Court for Pima County, Arizona, to ascertain the question of petitioner's mental condition is probably in itself a direct violation of *Pate v. Robinson,* a violation ratified by the United States Court of Appeals. But *Robinson* also suggests that sound mental capacity and condition are prerequisites to waiver of any constitutional right.

(3) Waiver is a federal question, *Fay v. Noia,* 372 U.S. 391, 439 (1963); *Brookhart v. Janis,* 384 U.S. 1, 4 (1966). It is a question of "fact" and not of "law," *Barber v. Page,* 390 U.S. 719, 725 (1968); *Fay v. Noia,* 372 U.S. 391, 439 (1963). There is a presumption against the waiver of constitutional rights, *Brookhart v. Janis,* 384 U.S. 1, 4 (1966), and waiver is not to be presumed from a silent record, *Burgett v. Texas,* 389 U.S. 109, 114-15 (1967) (right to counsel).

(4) No waiver is valid, even though consciously made with knowledge of alternatives, if it requires the relinquishment of one or more rights or privileges as the price of preserving other rights. This Court has clearly manifested this principle in several recent decisions. In *Garrity v. New Jersey,* 385 U.S. 493 (1967), a failure to waive the privilege against self-incrimination in an administrative hearing meant the loss of public employment; under circumstances like these it was not possible to speak of a valid waiver of the privilege. "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other" (385 U.S. at 498). In *Spevack v. Klein,* 385 U.S. 511 (1967), disbarment could have flowed from an assertion of privilege. It was held that protection of the privilege "should not be watered down by imposing the dishonor of disbar-

ment and the deprivation of a livelihood as a price for asserting it" (385 U.S. at 514, plurality opinion). In *United States v. Jackson*, 390 U.S. 570 (1968), the fact that the death penalty could be imposed by a jury but not by the court if jury trial were waived "needlessly chill(ed) the exercise of basic constitutional rights" (390 U.S. at 582). Therefore, the capital punishment provisions of the Federal Kidnapping Act were ruled constitutionally infirm.

The clearest holding to this effect is found in *Simmons v. United States*, 390 U.S. 377 (1968). One defendant, Garrett, had testified in support of his motion to suppress evidence; his statements were used as judicial admission at the trial of the cause after the trial court had found against Garrett on his motion, on the basis that he had waived his privilege against self-incrimination by testifying at the motion hearing. This Court held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another" (390 U.S. at 394).

Despite this Court's clear statements of doctrine requiring that a waiver, to be constitutionally valid, must be a conscious choice by a rational person between known alternatives, must be proven by the governmental unit seeking to rely on it, and must not constitute a choice between competing constitutional values, the Court of Appeals, like the Superior Court for Pima County, Arizona, and unlike the United States District Court for the Eastern District of Michigan, held on the basis of a silent record that petitioner's failure to appear in Arizona stemmed from a conscious and rational choice to relinquish her rights in Arizona of presence, confrontation and competent counsel. It also ignored the fact that the choice im-

posed on petitioner was either to abandon these rights or to relinquish her right to a regular and orderly extradition proceeding commenced against her by the State of Arizona.

This dilemma was not of petitioner's creation. Rather, it was the product of the fact that the Arizona Superior Court judge demanded immediate trial while the county attorney demanded extradition; it was thus Arizona's acts that forced an election. Since extradition is bottomed on the United States Constitution, Art. IV, Sec. 2, cl. 2, the system of interstate rendition, including review of actions taken under it, is of constitutional dimension, *Roberts v. Reilly*, 116 U.S. 80 (1885). In all respects material to this litigation, the provisions of the Uniform Extradition Act duplicate the federal statutes implementing the constitutional provision. Therefore, the Court of Appeals forced the petitioner to an election between constitutional rights, which petitioner asserts is in clear conflict with the applicable decisions of this Court, particularly *Simmons v. United States; Burgett v. Texas;* and *Johnson v. Zerbst.*

Point III

WHETHER THE AUTHORITY OF SWEENEY v. WOODALL HAS BEEN ERODED BY LATER DECISIONS OF THIS COURT TO THE POINT THAT IT SHOULD BE OVERRULED, CONFIRMING THE POWER OF A FEDERAL DISTRICT COURT TO GRANT HABEAS CORPUS IN THE ASYLUM STATE FOR CLEAR CONSTITUTIONAL ERROR IN DEMANDING STATE PROCEDURES, PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

Petitioner acknowledges that *Sweeney v. Woodall*, 344 U.S. 86 (1952), relied on by the Court of Appeals and by the Circuit Court for Jackson County, Michigan, held a federal district court could not consider the claim of an escaped Alabama chain gang prisoner that he had been cruelly and unusually punished before his escape, and would be again if he were returned. This Court required him to make his allegations "in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned" (344 U.S. at 90).

It is possible, as the District Court recognized (276 F. Supp. at 116), to distinguish *Woodall*. In that case no assertion was made that the underlying conviction was invalid, while in petitioner's case there is no question of its invalidity. In *Woodall* no showing appeared that relief was unavailable in the Alabama courts, while in petitioner's case the evidence in the District Court showed the strong probability of detention without bail pending appeal on the same point of federal constitutional law then before the District Court. Adjudication of Woodall's claim would have required the resolution of complicated fact questions which could more conveniently be dealt with in the demanding state. *Cf. Murray v. Burns*, 48 Hawaii 508, 405 P.2d

309 (1965); *Koch v. O'Brien,* 101 N.H. 11, 131 A.2d 63 (1957). In petitioner's case, the facts bearing on her claim of constitutional deprivation are not in dispute; only their significance need be determined. Indeed, Arizona in its brief before the Court of Appeals (pp. 14-15) seems to have acknowledged that *Sweeney v. Woodall* is inapplicable to a case of "irreparable harm" following rendition, though the Court of Appeals chose to apply it as controlling authority.

Petitioner, however, believes with the District Court judge that *Woodall* rested on a premise that "the interests of federalism transcend the constitutional rights of the individual" (276 F. Supp. at 116). With the District Court, petitioner believes, however, that in a series of recent decisions this Court has largely undermined the premise on which *Sweeney v. Woodall* appears to rest, and that petitioner's case offers an appropriate situation for re-evaluating that premise.

In *Fay v. Noia,* 372 U.S. 391 (1963), this Court overruled any precedent inconsistent with its holding that "federal courts have *power* under the federal habeas corpus statute to grant relief despite the applicant's failure to have pursued a state remedy" once available but no longer open to him (372 U.S. at 398-99). The decision, as characterized by the District Court, "was intended to strike down much of the prior law accommodating state criminal process to the doctrine of federalism" (276 F. Supp. at 117). As this Court said, "Of course orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure. But that state interest 'competed against an ideal . . . (the) ideal of fair procedure' " (372 U.S. at 431). Unless there had been a valid waiver under the tests of *Johnson v. Zerbst* (see *supra* at xx), the applicant was not to have been viewed to have

"deliberately by-passed the orderly procedure of the state courts" and to have "forfeited his state court remedies" (372 U.S. at 438). *Noia* could not be held to that standard because if he had appealed in the state courts he would have been subject to the death penalty and not merely the life imprisonment assessed against him after his first conviction.

In *Roberts v. LaVallee,* 389 U.S. 40 (1967), a United States court of appeals had determined that Roberts had been denied equal protection because he had been refused a free transcript necessary for his appeal; while the federal habeas corpus proceeding was pending the New York Court of Appeals invalidated the New York statute. Despite this, the court of appeals thought that the matter should be remanded to the New York courts in the interest of regularity. This Court reversed and ordered the federal writ to issue: "We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles" (389 U.S. at 43).

In three other decisions of this Court in the October 1967 Term, traditional limitations on federal habeas corpus were further eroded. In *Carafas v. LaVallee,* 391 U.S. 234 (1968), it was held that completion of sentence does not render a habeas corpus action moot if there are any disabilities that flow from conviction in a state court. Carafas had suffered and was continuing to suffer serious legal disabilities, and was not to be denied appropriate relief under 28 U.S.C. Sec. 2243 even though release from custody was no longer possible. Therefore, the matter was remanded for consideration of the petitioner's claim on the merits.

The second, in similar vein, is *Sibron v. New York,* 392 U.S. 40 (1968), in which Sibron's release after service of a brief misdemeanor sentence was held not to have rendered his federal appeal moot. This Court stated there, ". . . it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action" (392 U.S. at 57).

The third, *Peyton v. Rowe,* 391 U.S. 54 (1968), is even more closely analogous to petitioner's situation. The district court had refused to entertain an application for habeas corpus attacking a state sentence the applicant had not yet begun to serve, on the basis that he would not be "in custody" for purposes of federal habeas corpus until he began to serve the sentence he wished to attack. The court of appeals reversed, finding the precedent on which the district court relied to be a "doctrinaire approach" resting on an "old jurisdictional concept . . . thoroughly rejected by the Supreme Court in recent cases" (cited 391 U.S. at 57).

This Court was in "complete agreement with this conclusion and the considerations underlying it" 391 U.S. at 58. Decisions of the Court, including *Johnson v. Zerbst* and *Fay v. Noia,* had undermined the precedent on which the district court had relied; *McNally v. Hill,* 293 U.S. 131 (1934), to the extent that it had to be overruled. Delayed determination of federal claims would impair the ability to litigate factual claims. More to the point, *McNally* was "at odds with the purpose of the writ of habeas corpus in another respect (,) . . . swift judicial review of alleged restraints on liberty" (391 U.S. at 63). If petitioners

established "that the convictions . . . were obtained in violation of the Constitution," then:

> ". . . Each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men. Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time" (391 U.S. at 64).

Therefore, the power of the federal district court to entertain the application was sustained, so that relief against future imprisonment could be decreed before a prisoner actually began serving it.

In the instant case, the District Court reached three factual conclusions on the basis of the record before it: (1) There would be a minimum period of some months, and perhaps a period of years, before petitioner could exhaust her remedies under Arizona law in attacking her *in absentia* conviction, thus making her eligible to seek habeas corpus relief in the United States District Court for the District of Arizona. (2) In light of the ruling of the Superior Court in and for Pima County, Arizona, petitioner would not be eligible for bail pending review.[3] (3) Even if petitioner were placed on probation or paroled, she would be under "restraint and supervision" and would not have the "freedom of action enjoyed by a citizen not

---

[3] If the decision of the Court of Appeals is allowed to stand, a way has been found in all extradition proceedings to try *in absentia* any person who refuses to waive extradition, to deny him any relief in asylum state courts and in federal district courts with jurisdiction in the asylum state, and to require of him service of his sentence, including service of the maximum sentence if appellate delays are sufficient, while he endeavors to exhaust demanding state appellate remedies as a prelude to federal habeas corpus review. This would nullify the orderly extradition procedure contemplated under Constitution Art. IV, Sec. 2, cl. 2.

so beclouded" by the *in absentia* felony conviction (276 F. Supp. at 121). Petitioner believes that this is enough of an irreparable detriment under *Peyton v. Rowe* and *Carafas v. LaVallee* to warrant federal habeas corpus relief in the Eastern District of Michigan, and that any application of the doctrine of *Sweeney v. Woodall* to prevent that relief should be rejected by this Court.

In reconciling "the competing demands of comity and the judicial deference known as federalism" (276 F. Supp. at 121), there should of course be as little interference as possible with demanding state processes. However, in international extradition cases, no federal court has ever allowed extradition after an *in absentia* trial and conviction until it has received assurances that the *in absentia* judgment has been vacated so that the respondent will be tried upon return. *See, e.g., Gallina v. Fraser,* 177 F. Supp. 856 (D. Conn. 1959); *Ex parte La Mantia,* 206 Fed. 330 (S.D. N.Y. 1913); *Ex parte Fudera,* 162 Fed. 591 (C.C. S.D. N.Y. 1908). Due process of law would require such treatment here at a minimum, so that interstate rendition should be denied until the demanding state gives assurances that the petitioner will be given a prompt and constitutionally fair trial.

Therefore, petitioner believes (1) that *Sweeney v. Woodall* can be distinguished on the basis that there the underlying conviction was not in question, while in this case there is no question of its invalidity, (2) that the Court of Appeals' disposition of this case is in conflict with the applicable decisions of this Court, particularly *Fay v. Noia* and *Peyton v. Rowe,* and (3) that the relationship of these decisions to *Sweeney v. Woodall* in the context of federal extradition proceedings constitutes an important question of federal law that has not been, but should be, settled by this Court.

Point IV

WHETHER THE DEMANDING STATE CAN INTERVENE IN A FEDERAL HABEAS CORPUS PROCEEDING, ESPECIALLY WHEN THAT INTERVENTION IS UNTIMELY, PRESENTS A SUBSTANTIAL FEDERAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

Petitioner believes that this is the only case on record in which Federal Rule of Civil Procedure 24 has been utilized to permit intervention in a federal habeas corpus proceeding brought under 28 U.S.C. Sec. 2241(c)(3). *See* Note, *Multiparty Habeas Corpus,* 81 Harv. L. Rev. 1482, 1499 (1968). *Ornelas v. Ruiz,* 161 U.S. 502 (1896), relied on by the Court of Appeals, is not precisely in point, turning as it did on special statutory procedures implementing international extradition under treaty (18 U.S.C. Sections 3184, 3186, 3195).

Because jurisdiction at the outset of a federal habeas corpus proceeding is determined by the place of confinement, *Ahrens v. Clark,* 335 U.S. 188 (1945), on the present state of proceedings it would not have been possible for petitioner to have sued out a writ of habeas corpus against Arizona authorities in the United States District Court for the District of Arizona, and venue could not have been transferred there. 28 U.S.C. Sections 1404(a), 2241(d). Therefore, because intervention of right under Rule 24(a) is viewed as the counterpart to compulsory joinder under Rule 19(a)(2)(i) (*See* Advisory Committee's note to Rule 24(a)), and permissive intervention under Rule 24(b) has been viewed as the counterpart to permissive joinder (*Durkin v. Pet Milk Co.,* 14 F.R.D. 374 (W.D. Ark. (1953)), there is considerable question whether habeas corpus proceedings should under any circumstances be subject to Rule 24(a) or (b) intervention. This is particularly so because

of the requirement of 28 U.S.C. Sec. 2243 that "the court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." Intervention can interfere with this aim, as in effect it has in petitioner's case by permitting the State of Arizona to prolong these proceedings after the actual respondent, the State of Michigan, had expressed its willingness to abide by the District Court judgment under Section 2243.

Moreover, Rule 24 requires that any application be timely. Belated administrative decisions to intervene after an earlier determination not to intervene have not been thought by another court of appeals to justify a motion to intervene after a reasonable time limit for intervention has expired. *City of Philadelphia, Pennsylvania v. Morton Salt Co.*, 385 F.2d 122 (3d Cir. 1967). In petitioner's case, Arizona authorities were aware for some time, through their participation as *amicus*, that the State of Michigan might not appeal, yet they deferred action until after expiration of the time for submission of the motion under District Court rules. To the Court of Appeals, a denial of permissive intervention would have been "not only an abuse of discretion but an uncalled for affront to the State of Arizona." Petitioner believes the denial of intervention to New York authorities in *Morton Salt Co., supra*, may also have been an "affront," but was warranted by the need for strict application of Rule 24 time requirements.

The Court of Appeals' disposition of the Rule 24 matter constitutes an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

This Court should grant certiordri, and the judgment of the Court of Appeals reversed and that of the District Court affirmed.

Respectfully submitted,

BEAUFORD JAMES GEORGE, Jr.,
CLARK SHANAHAN,
Attorneys for Petitioner.

APPENDIX A

No. 18428

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

State of Arizona,
Intervenor-Appellant,
v.
Ernestine W. Hunt,
Appellee.

Appeal from the U.S. District Court for the Eastern District of Michigan.

Decided April 4, 1969.

OPINION

Before: O'Sullivan, Phillips and Celebrezze, Circuit Judges.

O'Sullivan, Circuit Judge. The State of Arizona, as intervenor, appeals from an order of the United States District Court for the Eastern District of Michigan, entered on October 25, 1967, granting habeas corpus relief to appellee, Ernestine W. Hunt. Appellee has moved to dismiss Arizona's appeal on the ground that Arizona should not have been allowed to intervene.

In March of 1964, in the Superior Court of Pima County, Arizona, sitting at Tucson, Ernestine W. Hunt, after a jury trial, was convicted, along with her husband, Dr. Maurice Hunt, of aggravated assault and battery upon

their five-year old adopted daughter. On October 5, 1965, Dr. and Mrs. Hunt were granted a new trial by the Court of Appeals of Arizona, *State v. Hunt,* 2 Ariz. App. 6, 406 P.(2) 208 (1965).[1] Thereupon, in violation of her appearance bond, she left the State of Arizona and has ever since refused to return there, and has thwarted every effort of Arizona to obtain her physical presence for trial. The retrial of her case, first set for February 1, 1966, was continued some seven times up to April 25, 1967, chiefly upon the assertions of her Arizona lawyer that Mrs. Hunt was too ill to leave her place of abode in Michigan. She has refused to submit to medical examination by Arizona doctors. Upon her failure to appear for trial or examination, and in March of 1967, Arizona began extradition proceedings to return her to Arizona. During the pendency of these proceedings in Michigan and because Dr. Hunt, appearing through separate counsel and claiming that any further delay would deprive him of his right to a speedy trial, objected to any further continuance, Mrs. Hunt was tried *in absentia* under an Arizona criminal rule permitting it where a defendant is voluntarily absent. She and her husband were on May 3, 1967, again convicted by jury verdict.

The extradition proceedings went forward, the Michigan authorities being advised of Mrs. Hunt's intervening conviction, and after hearings on May 22 and May 23, 1967, the Governor of Michigan, on May 24, honored Arizona's request and a rendition warrant was issued. Admitted to bail, Mrs. Hunt employed M.S.A. §§28.1264 and 28.1285 to test the validity of the rendition warrant in the state courts of Michigan. The Circuit Court of Jackson County,

[1] The charges against Mrs. Hunt involved serious physical abuses of her daughter. The new trial was granted because of the admission of evidence of physical abuse of the daughter on occasions earlier than the particular offense charged.

Michigan, the Michigan Court of Appeals and the Supreme Court of Michigan denied her any relief. Thereupon, she filed the habeas corpus petition now before us, claiming, *inter alia*, that the Arizona statute permitting her trial *in absentia* offended the Fourteenth Amendment to the United States Constitution. Processing of the rendition warrant was stayed and, on October 25, 1967, the United States District Judge concluded that the conviction of Mrs. Hunt was invalid. He ordered that unless the State of Arizona would make a commitment to vacate the conviction of Mrs. Hunt and grant her a new trial, he would not release her to the Arizona authorities. His opinion is reported as *In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967). Upon order of the District Court she has been at liberty upon her personal bond of $1,000.

We reverse.

Preliminarily, we think that the District Judge's characterization of Mrs. Hunt as a helpless victim of attempted oppression by the Arizona courts is misplaced. We fear that this laudable compassion and concern was the product of some wrong impressions. Ernestine Hunt has been treated with rather special patience by Arizona.

Mrs. Hunt was charged in 1964 with what could be fairly characterized as quite aggravated criminal conduct, which occurred in 1963.[2] She and her husband were convicted upon jury trial at which they were represented by retained counsel.[3] At some date after she was granted a new trial, she "jumped bail" and fled to Michigan. She has continued

---

[2] See *State v. Hunt*, 2 Ariz. App. 6, 406 P(2) 208 (1965).

[3] On the appeal to the Arizona Court of Appeals, Dr. and Mrs. Hunt were represented by the same counsel. We assume they were also represented at trial by the same counsel. During the long effort thereafter to bring Mrs. Hunt to trial, she and Dr. Hunt were separately represented by retained counsel.

as such fugitive ever since. We are unable to agree with the District Judge's more gentle description of her conduct. He said:

> "While at liberty on appeal bond the petitioner and her husband *absented* themselves from Arizona and established residence in Michigan. This was a *voluntary* departure, in the sense that it was *volitional*, and, although the Arizona court was aware thereof,[4] no steps were taken to return her to the jurisdiction, or to forfeit her bond, until the proceedings hereinafter described." 276 F. Supp. at 113-114. (Emphasis supplied.)

We suppose that every fugitive's flight is a "voluntary departure" and its accomplishment is indeed "volitional". The record does not tell when Arizona became aware that Mrs. Hunt had gone to Michigan. In any event, it learned so when her counsel began to ask for and obtain continuances on and after the first setting of a date for retrial. It is true that no steps were immediately taken to bring her back from Michigan. We cannot, however, criticize the Pima County Court in that, without instituting extradition, it relied upon the word of Mrs. Hunt's Arizona attorney, an officer of that Court, that his client would be present on the various days to which, and to accommodate her, trial was continued. It was not until Mrs. Hunt had flaunted the Arizona Court's order that she appear for a medical

---

[4] For support of the statement that "Arizona was aware thereof" the District Judge's footnote 3 says: "Testimony of Attorney D'Antonio [Mrs. Hunt's Arizona lawyer] before this Court, Tr. pp. 21-23." From this transcript, we find that the bond under which Mrs. Hunt was at liberty during the appeal, and the applicable rule, provided that she would not depart from Arizona without leave. The assertion that Arizona was aware of her departure is but one of many gratuitous and unsupported observations of her counsel.

examination to ascertain the truth of her Arizona counsel's statement that she was "psychologically in no condition to stand trial" that extradition proceedings were initiated.

Repeated representations were made by Mrs. Hunt's attorney that the condition of her health forbade her going to Arizona. On some occasions, these representations were merely the repetition by Arizona counsel of otherwise unsupported statements made by Mrs. Hunt's Michigan counsel. In only one instance were such representations supported. On one of the numerous adjourned trial dates, November 7, 1966, Mrs. Hunt's counsel filed an affidavit signed on November 2, 1966 by a Michigan doctor which, after describing her need for an hysterectomy, averred:

> "Deponent further says that from his examination of Ernestine W. Hunt, as of this date that she is far and much too nervous and under too much stress, and having too much discomfort from her condition, to be able to withstand a trial in Court. If she is compelled to withstand the stress and strain of trial in her present condition it would have a deleterious and serious effect on her physical and mental condition.
>
> "Deponent further says that in his professional opinion if certain tests that he must put her through because she may have diabetes, and certain other tests that he must subject her to and reports and histories that he must obtain from other examinations that she has had, indicate that he may proceed with the surgery as scheduled, then, and in that event, *in his opinion she will be able to withstand a trial in Court in all probability by the 1st of February, 1967.*" (Emphasis supplied.)

This is the only support every provided for the repeated gratuitous representations by Mrs. Hunt's attorney that illness prevented her appearance in Arizona. No evidence was ever presented that the contemplated operation had not been successfully performed on schedule, or that Mrs. Hunt was not, contrary to her doctor's expectations, sufficiently recuperated by February 1, 1967 to stand trial in Arizona.

Based upon this affidavit's representation, the Arizona judge continued the trial to February 28, 1967. On February 20, 1967, another motion for continuance was made, this time supported only by her attorney's statement that Mrs. Hunt could not appear for trial because of "her physical and psychological condition." Counsel's motion stated that:

> "Mrs. Hunt will be examined by a qualified physician in Michigan to confirm this condition."

No such confirmation was provided. The Arizona court, seeking to obtain reliable information as to Mrs. Hunt's condition, then entered an order directing Mrs. Hunt to present herself on March 2, 1967 for examination by two Tucson doctors. This order conformed to Rule 250 of Arizona's Rules of Criminal Procedure. Mrs. Hunt ignored the order, and we do not find that her attorney offered any excuse therefor.

On March 3, 1967, the Arizona court held Mrs. Hunt in contempt for failure to appear as ordered and directed that a bench warrant be issued for her arrest. On March 7, 1967, Mrs. Hunt's Arizona counsel again moved for a continuance, this time for "a four month postponement" averring that she was then a patient in Mereywood Hospital, Ann Arbor, Michigan,

"under the care of a Doctor of Psychiatry; that according to Mrs. Hunt's doctor she is incapable of traveling to Arizona to participate in this trial, and furthermore, that mentally she is incapable of assisting in her defense and she is incapable mentally in standing trial. In view of these facts she respectfully requests the Court that they be granted at least a four months' postponement of the trial in order to enable Mrs. Hunt to effect a recovery to the extent where she will be able to travel to Arizona and to the extent where she will be able to participate in her defense in order to go to trial."

The trial judge again continued the trial, this time to April 25, 1967. Again, other than his own statement, her lawyer offered no support for his averments as to Mrs. Hunt's presence in Mercywood and her physical condition. In the meantime, the extradition proceedings had been instituted and were going forward in Michigan.

On April 25, 1967, the final day set for trial, Mrs. Hunt was no longer hospitalized, having been released from Mercywood Hospital on March 23, but her attorney filed another motion for continuance, this time averring that the extradition proceedings then under way required her presence in Michigan. At no time was it suggested that Mrs. Hunt would waive extradition if accommodated as to a trial date. In addition to this written motion for continuance, Arizona counsel again represented to the Arizona judge that, according to reports received from his associate counsel in Michigan, Mrs. Hunt was physically and mentally unable to stand trial and recited that, although his firm had represented her for ten months, he had never been able to talk with her, either in Michigan or Arizona.

At this final day, April 25, 1967, the County Attorney was willing to consent to a four-month further delay but Dr. Hunt's separate counsel, as he had on several of the hearings for continuance, objected to any further continuance, "and asks leave to file a written objection so that there will be no question as to the objection later." The retrial had now been delayed for upwards of fourteen months from its first setting, and the trial judge observed:

> "Well, see the problem I have with that is that Mr. Marquez [Dr. Hunt's separate counsel] is sitting here trying to set everything up so that if there is a conviction, he can appeal *for lack of a speedy trial*, although I do believe he wouldn't be able to prevail, unless he shows somehow that he, the defense, was prejudiced by lack of a speedy trial." (Emphasis supplied.)

Mrs. Hunt's counsel's helpful rejoinder was, "That's his problem." At the conclusion of the hearing on Mrs. Hunt's motion for continuance, the trial judge said:

> "IT IS THE FINDING OF THE COURT that Ernestine W. Hunt is voluntarily absent.
>
> "IT IS ORDERED that Mr. D'Antonio's Motion for a Continuance is denied.
>
> "IT IS ORDERED that the State's Motion that the trial proceed as to both defendants and that Ernestine W. Hunt be tried *in absentia* is granted."

The trial went forward in Mrs. Hunt's absence. Dr. Hunt was present with his counsel as was Mr. D'Antonio, appearing for Mrs. Hunt. On May 3, 1967, the jury returned a verdict convicting Dr. Hunt of one of the counts of the Information and Ernestine W. Hunt of aggravated assault and battery upon and contributing to the dependency and delinquency of her adopted daughter.

The Arizona statute relating to trial *in absentia* is identified as Rule 231, Arizona Rules of Criminal Procedure. Subsection A thereof provides that the presence of a defendant charged with a felony is required at all times from arraignment to rendition of a verdict, except as provided in subsection B, as follows:

> "If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A [1, at arraignment; 2, when a plea of guilty is made], may be had in his absence if the court so orders."

In the Michigan *state* court habeas corpus proceedings to test the validity of the Governor's warrant, Mrs. Hunt challenged the validity, vis-a-vis the United States Constitution, of Rule 231B. On July 13, 1967, Circuit Judge Falahee of Jackson County said in dismissing her petition:

> "I find, therefore, that this petitioner should test the claimed unconstitutionality of her *in absentia* trial in the State of Arizona and by the Courts of that State.
>
> "This Court, as a State Circuit Court, does not choose to pass upon the constitutionality of the laws of the State of Arizona when not convinced that the petitioner does not have an adequate remedy in Arizona."

The Michigan Court of Appeals stayed extradition pending its consideration of Mrs. Hunt's application for a writ of superintending control. On August 17, 1967, it set down an order as follows:

> "IT IS ORDERED that the complaint for superintending control be, and the same is hereby dismissed.
>
> "IT IS FURTHER ORDERED that the motion for bail be, and the same is hereby DENIED."

"IT IS FURTHER ORDERED that the stay of proceedings entered by this Court on July 13, 1967 shall TERMINATE on September 7, 1967.

"Judge Levin Dissenting."

On September 7, 1967, the Supreme Court of Michigan disposed of Mrs. Hunt's motion for leave to appeal, saying:

"On order of the Court, the application for emergency leave to appeal is considered and the same is DENIED, because no sufficient reason appears why petitioner should not be returned to the demanding State of Arizona. The requests for further stay of extradition proceedings and for admission to bail are DENIED. GCR 1963, 865.1(7).

"O'Hara and Souris dissenting." 378 Mich. at 778.

The habeas corpus proceeding now before us was commenced in the District Court on September 6, 1967. Michigan's custody of Mrs. Hunt under the Governor's Rendition Warrant was defended by its Attorney General at all times, with the amicus curiae help of the Attorney General of Arizona, until entry of the final order here on review. Shortly after the commencement of this habeas corpus proceeding, the Attorney General of Michigan moved for a change of venue to the United States District Court for the District of Arizona, expressing among other reasons that the real party in interest was the State of Arizona.[5] This motion was denied.

[5] Mrs. Hunt was then physically present in Michigan and a transfer under 28 U.S.C. 2404(a) to Arizona would not be proper because Mrs. Hunt was not then in custody in Arizona. Venue in the Arizona District Court could, of course, have been easily arranged with the cooperation of Mrs. Hunt.

There followed two hearings before the District Judge with his final order, entered on October 25, 1965, holding:

> "With great deference to, and respect for, the Courts of our sister state, if the State of Arizona certifies to this Court that the Petitioner can and will receive an expeditious trial under the Federal constitutionally applicable principles as hereinabove outlined, Petitioner's return upon a proper requisition will not be prevented by this Court upon the showings here made. Failing such certification and requisition within a reasonable time the writ shall be granted and the Petitioner's discharge ordered. *The writ, as of today, is thus granted, conditioned as above, and* the Petitioner shall be admitted to bail." 276 F. Supp. at 121. (Emphasis supplied.)

On November 8, 1967, following the District Court order, the Arizona Attorney General wrote to the Attorney General of Michigan expressing a desire to appeal to this Court. As far as the record before us discloses, that letter went unanswered and, on November 17, 1967, the Arizona Attorney General dispatched to the Michigan Attorney General papers necessary to appeal from the District Court's order and requested that the Michigan Attorney General sign and file them in the District Court. On November 22, 1967, three days before the last day on which Arizona might seek to have an appeal prosecuted, the office of the Attorney General of Michigan advised Arizona by telephone that it would not undertake the appeal. Thereupon, the necessary papers for appeal were prepared—we assume by the Arizona Attorney General's office—and presented to the District Judge on the last day upon which notice of appeal could be filed—November 24, 1967. On that date and after advising Mrs. Hunt's attorney by telephone of the filing of

these papers, the District Judge granted the intervention in this language:

> "It is hereby ordered that the State of Arizona is made a party herein for the purpose of appeal of the order of this Court made on October 1967."

He also signed and filed a Certificate of Probable Cause and the Notice of Appeal.

On November 27, 1967, Mrs. Hunt's Michigan attorney made a motion to "Set Aside Order Making Arizona a Party for Purpose of Appeal." The District Judge, with some expressed reluctance, denied that motion.

On the day that the record on appeal was filed in this Court—January 16, 1968—Mrs. Hunt's counsel filed here a Motion to Dismiss Appeal and for Denial of Petition for Intervention. A Judge of this Court ordered that such motion be passed and considered with our plenary hearing of the appeal.

We have set out the proceedings had in this matter at the above length believing that the recital of them leads quickly to resolution of the questions involved. We consider four questions: First, should Arizona have been permitted to intervene; second, was Ernestine W. Hunt *involuntarily* absent from Arizona at the time she was tried *in absentia;* third, should the propriety of the involved procedure of the Superior Court of Pima County, Arizona, be first considered by the courts of that state; and, fourth, does Arizona's law providing for trial *in absentia* violate the United States Constitution?

1. Intervention by the State of Arizona.

We affirm the District Court's order allowing Arizona's intervention and deny appellees' motion made in this Court to dismiss Arizona's appeal. While the formal parties to an habeas corpus proceeding are initially the petitioner, (here Mrs. Hunt), and the respondent custodian of the petitioner, (here the Sheriff of Jackson County, Michigan), the real party in interest in extradition proceedings is the demanding state, here Arizona. In *Ornelas v. Ruiz,* 161 U.S. 502, 40 L.Ed. 787 (1896), the Republic of Mexico was seeking extradition of persons in the United States who had allegedly committed crimes in Mexico. A United States Court released the alleged suspects. Review was sought by Mexico, the demanding government, through its consul. The Supreme Court said:

> "The official character of [the Mexican Consul] must be taken as sufficient evidence of his authority, and as the government he represented was the real party interested in resisting the discharge, the appeal was properly prosecuted by him on its behalf." 161 U.S. at 507.

Such, in substance, were the holdings in *Cleugh v. Strakosch,* 109 F(2) 330, 332 (9th Cir. 1940), and in *Wacker v. Bisson,* 348 F(2) 602, 606 (5th Cir. 1965). Although these cases permitted a foreign nation to appeal from the denial of an extradition warrant, we find no authority to indicate that a different principle should be applied where one of the states of the United States is the appellant. Cf. *State v. Parrish,* 242 Ala. 7, 5 So(2) 828, 832-833 (1941). We consider that intervention by Arizona, as a real party in interest, was proper under Rule 24(b), Fed. R. Civ. P.

Appellee further attacks the District Court order on the ground that Arizona's application was not timely made in

that notice of it was served upon petitioner's counsel and presented to and heard by the District Judge on the same day as the order granting it. Rule 24(c), Fed. R. Civ. P., provides that notice of a Motion to Intervene shall be served as provided in Rule 5. That rule requires a five day notice of hearing on all motions "unless a different period is fixed by these rules or by order of the Court." We consider that under the exigent circumstances above set out the District Judge properly exercised his discretion in hearing the motion and disposing of it on the day it was presented.

Not to have allowed intervention under the circumstances here would, in our view, have been not only an abuse of discretion but an uncalled for affront to the State of Arizona.

2. Was Mrs. Hunt voluntarily absent from Arizona?

The District Judge made no finding as to the voluntariness of Mrs. Hunt's absence from Arizona, but she urges here that we should find that her absence was involuntary. A contrary finding was made by the Arizona trial judge. From the history we have set out above, we are satisfied that Mrs. Hunt's absence from her trial was deliberate and voluntary.

Three hearings were held before the District Judge in Michigan after this case was started in September, 1967. At none of these hearings did Mrs. Hunt appear and give evidence substantiating the unsupported assertions of her attorneys that ill health was the cause of her long refusal to go to Arizona; neither was her deposition to that effect ever presented. In all events, if she was ill at the time of her trial *in absentia*, surely evidence of such fact could have been provided by Michigan doctors. If it is true that Mrs. Hunt had been hospitalized for mental or physical

disorders, or both, she was released more than a month prior to the commencement of her trial *in absentia*.

We repeat our conclusion that the District Court's obvious umbrage at the judicial and prosecutorial officers of Arizona must have been the product of misapprehension of the true situation. Arizona has the right to protect itself from the impositions of "bail jumpers" and to exhibit the sophistication needed to recognize dissembling when it sees it. Whatever excuses are employed, this lady was, and is, a fugitive from Arizona.

Mrs. Hunt claims that, if extradited to Arizona, irreparable injury will befall her in the form of imprisonment while the appeal of her conviction arduously proceeds through the Arizona courts. We find nothing to justify such assertion. The brief of the Arizona Attorney General avers that his office would respect an order,

> "conditioning her [Mrs. Hunt's] return on the assurance that she would be admitted to bail pending the outcome of appeal procedure, and that she will be allowed unrestricted access to the Arizona appeal courts * * *."

Notwithstanding this offer, we would not exact such a condition. We assume that the Attorney General and courts of Arizona will give proper consideration to an application for bail pending appeal.

3. Should the propriety of the involved procedures of the Superior Court of Pima County, Arizona, be first considered by the courts of that state?

We consider that the Supreme Court's decision of *Sweeney v. Woodall*, 344 U.S. 86, 97 L.Ed. 114 (1952), is dispositive of this case. There a fugitive from Alabama, as is Mrs. Hunt here a fugitive from Arizona, was taken

into custody by the Sheriff of Cuyahoga County, Ohio, pursuant to extradition proceedings brought by Alabama. The fugitive instituted habeas corpus in the Ohio Court of Common Pleas upon the ground that he had been unconstitutionally dealt with in Alabama and would be so treated again if returned there.

> "Invoking the Eighth and Fourteenth Amendments, he asserted that his past confinement had amounted to cruel and unusual punishment, that any future confinement administered by Alabama would similarly be in violation of rights secured to him under the Federal Constitution. Respondent asked that petitioner's efforts to return him to the custody of Alabama be halted and that he be immediately released." 344 U.S. at 87.

The fugitive was denied relief at the trial court level and then, as stated by the Supreme Court:

> "This judgment was affirmed by the Ohio Court of Appeals for the Eighth District. 88 Ohio App. 202, 89 N.E. 2d 493. An appeal to the State's Supreme Court was dismissed. 152 Ohio St. 368, 89 N.E. 2d 494. This Court denied a petition for certiorari. 339 U.S. 945." 344 U.S. at 87.

As here, the fugitive then entered the Federal Courts for habeas corpus relief. The United States District Court for the Northern District of Ohio dismissed the petition. On appeal this Court reversed, remanding the cause to the District Court for a hearing on the merits. *Woodall v. Sweeney,* 194 F(2) 542 (6th Cir. 1952). Certiorari was granted and this Court was reversed. The Supreme Court said:

"In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and *although he has made no attempt to raise such a question in the demanding state.* The question is whether, under these circumstances, the district court should entertain the fugitive's application on its merits.

"Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers he certainly would be entitled to no privilege permitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama in a forum where there would be no one to appear and answer for that State. Indeed, as a prisoner of Alabama, under the provisions of 28 U.S.C. §2254, and under the doctrine of *Ex parte Hawk, supra, he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.*

"By resort to a form of 'self help' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the

claimed abuses of its prison system. *Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State.* Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." 344 U. S. at 88-90. (Emphasis supplied.)

Aware of its analogy and dispositive authority, the District Judge said of the *Sweeney* case:

> "If the *Sweeney* case stood alone this court would be precluded from granting any relief in the matter before us." 276 F. Supp. at 116.

After saying that *Sweeney* "has never been squarely overruled," the District Judge observes that "much constitutional history has been written since *Sweeney*," and sets out a list of cases that have been decided after *Sweeney*.[6] We, however, fail to find any of them of controlling relevance to the case at bar. For support of a position that *Sweeney* does not now forbid his conclusion, the District Judge relies primarily upon *Fay v. Noia*, 372 U.S. 391, 9 L.Ed.(2) 837 (1963), which, according to him, "was intended to strike down much of the prior law accommodating state criminal process to the doctrine of federalism." 276

---

[6] *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

F. Supp. at 117. While *Noia* has been employed to support a great variety of claims of deprivation of constitutional rights, we find no collision between its holding or its general dissertation and the holding and language of *Sweeney v. Woodall, supra.*

Until some use of remedial processes in Arizona has been tried—motion for new trial,[7] vacation of judgment, appeal, habeas corpus in the Arizona state courts or in the United States District Court for the District of Arizona—we should not aid this lady to ignore the courts and laws of Arizona.

4. Constitutionality of conviction.

We are of the view that, under the facts of this case, the District Court was not required to pass upon the constitutionality of Arizona's statute permitting trial *in absentia* of a fugitive who is voluntarily absent from the place of trial. Neither need we.

Unconstitutionality should indeed be found in a rule or statute which denies an accused the *right or opportunity* to be present and with counsel to exercise all of his constitutional rights. But Mrs. Hunt was denied neither the right nor the opportunity to exercise hers; and the accused criminal rule does not condone such denial. Mrs. Hunt chose to *refuse* to exercise her rights and clearly waived them.

Among other reasons, Mrs. Hunt excuses her failure to challenge the constitutionality of the involved statute in the courts of Arizona on the ground that Arizona has already sustained its constitutionality, citing *State v. Cumbo,*

---

[7] Arizona's brief to the District Court averred that Mrs. Hunt's attorneys "did make a motion for new trial, so that her appeal is secured procedurally as a matter of statutory right, if taken within sixty days of the entry of judgment, which has not yet occurred." See Arizona Rules of Criminal Procedure, Rule 348.

96 Ariz. 385, 396 P(2d) 11 (1964). The constitutionality of the mentioned statute was not there involved nor raised.

Arizona argues that Rule 231 of its Rules of Criminal Procedure, which permits trial *in absentia* in circumstances present here, does not differ substantially from our own Rule 43 of the Federal Rules of Criminal Procedure. Such rule provides, in part:

> "In prosecution for offenses not punishable by death, the defendant's *voluntary absence* after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict * * *." (Emphasis supplied.)

We find little difference in substance between that rule and the attacked Arizona rule. This lady was present at her first trial and upon remand her attorney was present at every stage of the proceeding, including the trial had in her voluntary absence. The District Court found inapplicable *Diaz v. United States*, 223 U.S. 442, 56 L.Ed. 500 (1912), and *Pearson v. United States*, 325 F(2) 625 (D.C. Cir. 1963). We find them in point upon the principle that voluntary absence from the trial forecloses later claim of constitutional deprivation. The District Judge disposes of these cases with the observation that,

> "We need not pass here upon the problem presented occasionally when a criminal defendant seeks to make of his trial a carnival of contempt." 276 F. Supp. at 118.

In our view, the conduct of Mrs. Hunt can easily be equated with the District Judge's phrase, "carnival of contempt."

There is little disagreement with the general proposition that voluntary absence from a trial, not for a capital offense, waives the right to be present.[8] In *Diaz v. United States, supra,* the Supreme Court quoted with approval the following from *Falk v. United States,* 15 D.C. App. 446, 454, *appeal dismissed,* 180 U.S. 636, 45 L.Ed. 709 (1901):

> "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (U.S. Rev. Stat. §1015, U.S. Comp. Stat. 1901, p. 718) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and therefore, in all such cases, he may, by absconding, prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty." 223 U.S. at 457.

We are of the opinion that no Fourteenth Amendment or other right of Mrs. Hunt was impaired by what Arizona did in this matter.

The judgment of the District Court is vacated, the writ is discharged and an order shall be there entered directing

---

[8] See, 23 C.J.S. "Criminal Law" §975; *State v. Gorman,* 213 Minn. 401, 129 N.W. 589 (1911); *State ex rel. Shetsky v. Utecht,* 228 Minn. 44, 36 N.W. (2) 126 (1949); *Parker v. United States,* 184 F(2) 488 (4th Cir. 1950); *United States v. Noble,* 294 Fed. 689 (D. Mont. 1923); *United States v. Vassalo,* 52 F(2) 699 (E.D. Mich. 1931); *Cureton v. United States,* 396 F(2) 671 (D.C. Cir. 1968).

that Mrs. Hunt be returned to Arizona pursuant to the Michigan Governor's rendition warrant.

UNITED STATES DISTRICT COURT

Eastern District of Michigan, Southern Division

In the Matter of Ernestine W. Hunt for a writ of habeas corpus	Civil Action No. 30346

OPINION AND ORDER

At a session of said Court held in the Federal Building, City of Detroit, Michigan, on October 25, 1967.

Present: Honorable Talbot Smith, United States District Judge.

In this case we must consider the application of the "Great Writ"[1] in the most delicate of circumstances, involving the relationship of a lower Federal Court to the legal process of a sovereign state. Arizona has tried the petitioner, on a felony charge, in absentia, (a procedure permitted by Arizona law) and has convicted her. She is in Michigan, before this Court, her extradition having been requested and ordered. She argues that such a trial has not afforded her due process, and if she is returned to Arizona all that remains is to sentence her. In opposition it is urged that this Court need not consider what has happened heretofore in Arizona, indeed that upon the authority of *Sweeney v. Woodall*, 344 U.S. 86, *reh. den.* 344

[1] Brennan, J., in *Fay v. Noia*, 372 U.S. 391, 411-12 (1963).

U.S. 916 (1952), reversing 194 F2d 542 (CA 6, 1952)[2] it is not our concern. Such are the outlines of the controversy. There are no disputed facts, save possibly what may happen in Arizona, if she is returned there. The issues presented are of law.

In more detail, what happened was this: On January 13, 1964, in the State of Arizona, Ernestine W. Hunt and her husband, Maurice, were charged with aggravated assault and battery, and contributing to the delinquency of their five year old adopted daughter.

The defendants were tried, convicted, and appealed. Their convictions were reversed (pre-trial publicity played a part) and the cause remanded for new trial. While at liberty on appeal bond the petitioner and her husband absented themselves from Arizona and established residence in Michigan. This was a voluntary departure, in the sense that it was volitional, and, although the Arizona court was aware thereof,[3] no steps were taken to return her to the jurisdiction, or to forfeit her bond, until the proceedings hereinafter described. (We will interject at this point that upon such showing we cannot find, without more, that this was a "waiver" of her rights as to all which followed.) The cause was set and re-set for trial, petitioner requesting various delays, but she was finally ordered to appear for trial. This she failed to do. Bench warrants were thereupon issued and the forfeiture of her bond taken under advisement.

On March 23, 1967, petitioner was arrested on a fugitive warrant in the City of Ann Arbor and bail set. On April

---

[2]The discussion of this case and its antecedents found in 74 Yale L.J. 78 has been particularly helpful.

[3] Testimony of Attorney D'Antonio before this Court, Tr. pp. 22-23.

10 extradition papers were forwarded by Arizona (she had refused to waive extradition) and received by Michigan's Governor. (Further details as to the extradition process will be discussed *infra*). On April 25, 1967 petitioner's trial in absentia was begun in Arizona and a jury verdict of guilty returned.[4] She is now awaiting sentence in Arizona and it is sought to return her for such purpose. We have required exhaustion of this state's process[5] before considering the merits of the writ. Prior hereto, we have held two preliminary hearings, denied a motion for transfer, issued certain rulings with respect to the hearing on the merits now concluded, have held pre-trial conferences and have executed a pre-trial order.

We will consider at the outset the validity of the extradition hearings. Extradition, as we have heretofore held,

---

[4] "Rule 231. Proceedings at which presence of defendant required in felony prosecution; exception

A. In a prosecution for a felony the defendant shall be present:

1. At arraignment.
2. When a plea of guilty is made.
3. At the calling, examination, challenging, impaneling and swearing of the jury.
4. At all proceedings before the court when the jury is present.
5. When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.
6. At a view by the jury.
7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders."

[5] See, Opinions of Court of Appeals, in the Matter of Ernestine W. Hunt, Plaintiff, No. 4030, Aug. 29, 1967; Supreme Court of Michigan, No. 51871, dated Sept. 7, 1967.

is a Federal matter and the Federal courts have the power to determine whether a person is detained by authority of the United States. The basic authority therefor is found in Article 4, Sec. 2, Cl. 2, of the Constitution of the United States.[6] The implementing Federal statute is found in 18 U.S.C.A. Sec. 3182. (See, also, the Uniform Extradition Act, C.L. 1948, Sec. 780.12, Stat. Ann. Sec. 28.1285 (12).)

The main thrust of petitioner's attack upon the extradition proceedings conducted by the Governor of Michigan, resulting in the Governor's authorization of return, rests upon a change in petitioner's legal status. At the time the Governor of Arizona made requisition he did so on the ground (covering letter of Gov. Jack Williams, dated March 31, 1967) that Petitioner "stands charged with the crime of Aggrevated (sic) Assault and Battery, a felony", and thus was to be returned for trial, a purpose also made clear in a communication from William J. Schafer III, County Attorney of Pima County, Arizona, dated March 13, 1967.

Nevertheless, on April 25, 1967 the Superior Court of Pima County, over objection (as discussed *infra*) and with knowledge by such Court, the County Attorney, and Defense Attorney, that extradition proceedings were pending, ordered in accordance with Arizona's Rule 231, that an in absentia trial proceed, which it did, conviction resulting. Thus at the time, May 24, when the Governor of Michigan advised Petitioner's counsel that the agent's authorization (to return Petitioner to Arizona on the ground that she "stands charged" with the aforedescribed felony), would

---

[6] "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and can be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

issue, and that Arizona's extradition request would be honored, Petitioner had, to Michigan's knowledge, already been tried and convicted in absentia, and thus could not be returned for trial. She could only be returned for sentencing.

The State of Michigan argues that the documents forwarded to the Michigan Governor's office on April 10, 1967, adequately reflected the status of the charges against Petitioner on such date and that nothing in the Uniform Criminal Extradition Act[7] requires, or even suggests, that an extradition request, proper when filed, need be amended to reflect a subsequent change in the legal status of the fugitive in the demanding state, that, indeed, Petitioner was still "charged" with the described felony in the demanding state, since she had not yet been sentenced.

Further arguments, pro and con, are made by the parties but we will not exhaust them in view of the circumstance (which we find to be a fact) that the Governor's extradition hearing took cognizance of Petitioner's change of status and that the proceedings were conducted in the light thereof. It would have been a more perfect procedure, technically, to have required a formal amendment, but we find no prejudicial error in what was done.

We have previously ruled that we will consider in this hearing the procedures complained of with respect to Petitioner's trial in absentia in the State of Arizona. Respondent vigorously protests, asserting, primarily upon the authority of the *Sweeney* case, *supra,* that we cannot look beyond the adequacy of the demand, the content of the instruments submitted. There is something, we concede, to be said for this point of view. It simplifies the task of the

[7] Mich. Stat. Ann. Sec. 28.1285 (1) et seq.

asylum state and the courts thereof, both state and Federal therein, as well as avoiding acerbic and demeaning controversies between jurisdictions. Yet before us is a woman charged with a serious offense, tried in absentia while she was in confused mental state,[8] and it is our order, in effect, returning her for sentencing, which is sought. This court cannot agree that it must close its eyes to what has gone before, which is the basis, indeed, for what lies ahead, or that we may not apply recognized constitutional principles to her situation. The essential question for this court involves Arizona's attempted utilization of the Federal extradition procedures. Are they sought to be employed, as petitioner asserts, to inflict irreparable harm upon her? Or, as respondent asserts, is this a matter foreclosed to our consideration if the papers are in order?

At the outset we will observe that it was not too many years ago that such considerations as the future of the petitioner in the demanding state (*e.g.*, whether or not the petitioner would be subjected to mob violence if returned) were beyond the scope of inquiry in federal habeas corpus.[9] In the early 1940's however, the wall was cracked. *Commonwealth ex rel. Mattox v. Superintendent,* 152 Pa. Super. 167, 31 A.2d 576 (1943),[10] *Johnson v. Dye,* 175 F.2d 250 (CA 3, 1949), *rev'd per curiam,* 338 U.S. 864, *reh. den.* 338 U.S. 896 (1949), and their progeny[11] followed, all culminating in the leading case of *Sweeney v. Woodall,* 344 U.S. 86, *reh. den.* 344 U.S. 916 (1952), referred to hereinafter

---

[8] See representations of her counsel to Arizona trial court, *infra.*

[9] *Marble v. Creecy,* 215 U.S. 63 (1909).

[10] Discussed in 53 Yale L.J. 359, "Scope of a Habeas Corpus Hearing on Interstate Extradition of Criminals."

[11] See, *U.S. ex rel. Jackson v. Ruthazer,* 181 F.2d 588 (2d Cir.), *cert. den.* 339 U.S. 980 (1950); *Johnson v. Matthews,* 182 F.2d 677 (D.C. Cir.), *cert. den.* 340 U.S. 828 (1950); *Davis v. O'Connell,* 185 F.2d 513 (8th Cir. 1950); *Ross v. Middlebrooks,* 188 F.2d 308 (9th Cir. 1951).

as *Sweeney*. Before leaving the pre-*Sweeney* cases we will observe (and this observation applies equally to the post-*Sweeney* cases) that rarely have we read a series of cases so lacking in unanimity as to reasoning, so productive of a drumfire of dissents (*e.g.*, dissent of Bazelon, J., in *Johnson v. Matthews*, 182 F.2d 677 (CA D.C. 1950)) Opinion of O'Connell, J., in *Johnson v. Dye*, 175 F.2d 250 (CA 3, 1949). The reason is not difficult to fathom. In each case there has been a conflict between the demands of simple humanity and the demands of comity and federalism.

Sweeney involved two escapees from an Alabama chain gang. They alleged a variety of wrongs, such as "frequent beatings with a nine pound strap with five prongs, at the end of each prong was a silver half dollar", subjection to the "gravel treatment" as well as other alleged abuses and indignities.[12] Both Ohio, the asylum state, and Georgia (Amicus Curiae) urged that Woodall did not claim he could not get a hearing in Alabama, and, assuming the availability of the Alabama remedy, the court held that considerations fundamental to our federal system required that Woodall make his allegations of unconstitutionality "in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned."[13]

If the *Sweeney* case stood alone this court would be precluded from granting any relief in the matter before us. True, it might be argued[14] that *Sweeney* is really grounded

---

[12] Petition for Writ, p. 5, Records and Briefs, Supreme Court.

[13] *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952).

[14] See, Mussmano, J., dissenting in *Commonwealth v. Baldi*, 378 Pa. 504, 106 A2 777, 780.

upon a deficiency in the proofs offered, namely, that *Woodall* made "no showing that relief is unavailable to him in the courts of Alabama"[15] and thus does not present the issue before us of irreparable injury, carefully pleaded and properly established, going to the point that the in absentia trial of a defendant voluntarily absent has been held constitutionally valid by the highest court of the demanding state, *State v. Combo*, 96 Ariz. 385, 396 P.2d 11,[16] and that there is no state remedy available. From this it would follow that *Sweeney*, properly read, does not foreclose a broad scale inquiry (going to the validity of the proceedings in the demanding state) upon a proper showing. This construction of the *Sweeney* case, however, is not in my opinion justified. Rather it would seem to be a square holding that the interests of federalism transcend the constitutional rights of the individual.

The question squarely posed, then, is this: At this time, does *Sweeney* still control the situation before us? There is much to be said on the ground that it does. It has never been squarely overruled. The Federal-State structure is as delicately balanced today as it was of *Sweeney's* date. The intrusion of a lower and foreign federal court into a situation sanctioned and approved by the highest legal authority of a sovereign state is not conducive to the harmony desirable between our often conflicting jurisdictions. Furthermore, we put to one side, without discussion, other, more technical considerations, such as, for example, the fact that extradition is a federally established procedure, as to which, it might be assumed, the federal courts have

---

[15] *Sweeney, supra*, p. 89.

[16] Amicus informs us that District Judge C. A. Muecke held on the basis of the record before his court that defendant did not voluntarily absent himself from the courtroom and ordered his release, conditional upon his re-trial, Civil No. 6058-Phx, March 10, 1967.

a peculiar responsibility. Surely such considerations were as obvious at the time of *Sweeney* as today. We must return, then, to the conflict between "the fundamental considerations of humanity and decency which are reflected in the Bill of Rights" and the constitutional purpose of "promoting efficiency and comity between states".[17] Is *Sweeney* still the law?

It is at once apparent that a different climate exists today with respect to Fourteenth Amendment's problems. No useful purpose would be served by attempting to chart, precisely, the course of the Great Writ down through the years. It has been similar to the course of a sailing vessel rounding the Horn. There has been much yawing and tacking. At all times, though, a clearly discernible objective has been followed which I take to be the supply of a remedy for procedures so grossly offensive to the current mores as to make injury subject to them offensive to due process. If we are correct in this analysis it remains to examine *Sweeney's* holding in the light of today's interpretations of constitutional principles.

Much constitutional history has been written since Sweeney. The names of the landmark cases since that time are legion. Their holdings cast new light upon Fourteenth Amendment problems. To cite but a few we have had *In re Gault*, 387 U.S. 1 (1967); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogen*, 378 U.S. 1 (1964); *Douglas v. California*, 372 U.S. 353 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). The catalog is not here exhausted. It is clear that the Supreme Court "within the

---

[17] Bazelon, C.J., dissenting in *Johnson v. Matthews*, 182 F.2d 677, 685 (D.C. Cir.) 1950, *cert. den.* 340 U.S. 828 (1950).

last half-century has dealt increasingly with state administration of justice in constitutional terms."[18]

But most important for decision in this case, is *Fay v. Noia*, 372 U.S. 391 (1963). This case, in our judgment, was intended to strike down much of the prior law accommodating state criminal process to the doctrine of federalism. As the Court put it, "To the extent that any decisions of this Court may be read to suggest a standard of discretion in federal habeas corpus different from what we lay down today, such decisions shall be deemed overruled to the extent of any inconsistency."[19]

We approach the problem, then, only slightly enlightened by the pre-*Noia* holdings and go directly to the argument that irreparable future injury faces the Petitioner if returned to Arizona, such injury arising out of a past and alleged flagrant deprivation of constitutional rights. Arizona, by Amicus, argues to us that Petitioner "has not tested the validity of that conviction by any of the state procedures presently available to her, nor has she shown this court any reason to seriously question the validity of the conviction."

We have decided, *supra*, that it is our duty in these proceedings to review the validity of the in absentia trial. In support of its validity Counsel for Arizona relies upon such cases as *Diaz v. U.S.*, 223 U.S. 442 (1912), and, *Pearson v. U.S.*, 325 F.2d 625 (1963). *Diaz* involved a situation wherein "on two occasions in the latter part of the trial, he [defendant] voluntarily absented himself and sent to the court a message expressly consenting that the trial proceed in his absence, which was done". *Pearson* involved

---

[18] Brennan, J., in The Bill of Rights and the States, 36 N.Y.U.L.R. 761, 774 (1961).

[19] 372 U.S. at 439, n. 44.

an aggressive and belligerent defendant who insisted upon returning "to the bullpen" during the trial. In neither case was there held to be a violation of constitutional principles. We need not pass here upon the problem presented occasionally when a criminal defendant seeks to make of his trial a carnival of contempt. Certainly the Court need not await his grace. Nor need we pass upon an affirmative waiver of a constitutional right made personally by a criminal defendant, though in such situation the utmost care must be employed. Nor, we will note at this point, do we have the situation referred to in Rule 43, Federal Rules Crim. Procedure, since the trial was not "commenced in [her] presence". In fact, none of it was so conducted. The cases cited are not in point. This case relies upon the provisions of Arizona's Rule 231, hereinabove set forth authorizing an in absentia trial "If the defendant is voluntarily absent."

The word "voluntarily" in this rule may have various meanings. We look to the Arizona court for its construction in that state, in the light of their experience and their familiarity with the case and statutory law governing the construction of this crucial word. I find, in the transcripts before me,[20] the following:

> "Mr. D'Antonio: Your Honor, I wish to state to the Court that since I have been retained by Ernestine W. Hunt as her counsel, I have not had the opportunity as yet, No. 1, to see her; No. 2, to talk with her and discuss her case with her; No. 3, to discuss with her my possible defenses; No. 4, to discuss with her whether or not she could testify on her own behalf and offer evidence on her own behalf; whether or not she

[20] Case No. A-13985, *State of Arizona v. Maurice E. Hunt, Ernestine W. Hunt*, date April 25, 1967.

could call witnesses on our own behalf; whether or not she could assist me insofar as interrogating or calling witnesses who would benefit her in this case. Under those circumstances, your Honor, I believe that an Order compelling her to go to trial, in the light of the record in this case, in the light of the fact that she has had and probably does have a form of physical or mental illness which prevents her from assisting her counsel, amounts to a denial of her rights under the 6th Amendment."

The following also appears:

"The Court: How long have you been the counsel for Mrs. Hunt?

"Mr. D'Antonio: I would say that the moving papers in our office indicate that we have been counsel for perhaps ten months, perhaps longer.

"The Court: During that time have you gone back to attempt to talk with her?

"Mr. D'Antonio: No, your Honor, I have not gone back to the State of Michigan.

"The Court: Have you asked her to come back here?

"Mr. D'Antonio: I have on repeated occasions asked her to come out here, and we have written letters begging, in fact, begging for at least three or four days' time in which to help prepare the case.

"The Court: And she did not come, is that correct?

"Mr. D'Antonio: On certain occasions—on one occasion she was actually hysterical. There was no communication, within the normal meaning of communication, between an attorney and client. There was no way to confer. There was at one time doubt in my mind that Mrs. Hunt even recognized that I was her attorney to help and assist her. She was hostile to me, as if I were an associate of Mr. Weiss.

"The Court: This is over the telephone you are talking about?

"Mr. D'Antonio: This is over the telephone and other mediums of communication. I have talked to attorneys who represented her in Michigan who have advised me of this fact; that is to say, they have told me, 'Mr. D'Antonio, Mrs. Hunt does not even recognize you as an attorney who is retained to assist her in her defense. She has somewhat in her mind associated you with the prosecution. She is unable, therefore, to communicate with you on any normal or confidential matter.'

"What I'm telling the Court is simply this: I consider myself a reasonably competent attorney, but I don't consider myself so able or so gifted that I am able to proceed with the defense of this case without my client being present in the first instance, or without even knowing what my client intended that I should do on her behalf."

Despite the foregoing, trial was commenced on said date, April 25, 1967, in absentia, pursuant to Rule 231. The Minute Entries contain the following:

"Mr. D'Antonio requests that the record show that during the entire trial Ernestine Hunt was not in the Courtroom."

As noted, upon such representations, so made, trial in absentia was ordered and proceeded forthwith. We can only conclude that a defendant is "voluntarily" absent under Arizona's interpretation of Rule 231, and has waived his constitutional rights even though such defendant, speci-

fically by counsel, requests continuance of the trial,[21] protests its conduct, denies waiver of constitutional rights, and asserts physical and mental inability to be present or to assist counsel.

There is no doubt that "whenever his [the defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" (*Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)), a defendant has the right to be present at his trial. The Sixth Amendment right to confrontation of witnesses is also specifically a part of the Fourteenth Amendment as a result of *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065 (1965), wherein the Supreme Court stated:

> "We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him". (380 U.S. at 403-04)

The most recent re-affirmation of this principle is found in the case of *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245 (1966). In this case Brookhart's lawyer apparently agreed to what is called a "prima facie trial" under Ohio practice, in which, though the defendant does not plead guilty, he remains passive while a prima facie case is presented by the prosecution, after which the court enters a judgment based on the sufficiency of the evidence as prima facie

---

[21] "Mr. D'Antonio: Your Honor, the nature of the written motion filed this morning is a request that this Court, in the exercise of its own discretion, continue the trial as to the Defendant, Ernestine Hunt."

evidence, and sentences the defendant if the judgment is one of conviction. The Supreme Court held that absent a constitutionally valid waiver, the proceeding denied Brookhart due process of law. The Court stated in part:

"In this Court respondent admits that:

'(I)f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of error would cure it.'

This concession is properly made. The Sixth Amendment provides that: 'In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .' And in *Pointer v. Texas*, 380 U.S. 400, 406, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment' . . . It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine those witnesses his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement . . ." (384 U.S. at 3-4)

It is abundantly clear that the in absentia trial proceedings violated petitioner's right under *Snyder v. Massachusetts* to be present whenever her presence had a "relation, reasonably substantial, to the fullness of (her) opportunity to defend against the charge," and her rights under *Pointer* and *Brookhart* to confront and cross-examine the witnesses against her. It is also evident, as indicated by the protests lodged by Mrs. Hunt's Arizona attorney of record during the Pima County proceedings April 25, 1967 (transcript at pp. 7-11), that she was denied the effective assistance of counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is our conclusion upon these facts, and the law applicable thereto, as hereinabove set forth, that there was no valid waiver by Petitioner of her constitutional rights, and that the Arizona rule as construed is patently offensive to constitutional principles. It violated Petitioner's right to be present at her criminal trial, her rights of confrontation and cross-examination, and to the aid of counsel.

Counsel for Arizona denies that irreparable injury awaits her if she is returned to Arizona to test these procedures in the courts of that state. Petitioner, however, asserts (on the basis of her prior appeal, *State v. Hunt*, 2 Ariz. App. 6, 406 P. 2d 208, 1965) that it will take approximately two years to have her case ruled upon. Amicus denies. With reported examples from current cases, it is argued to us that "The average elapsed time from filing of notice to decision is approximately seven and one-third months. Decision has been delayed in cases where a divided court has sought concensus, but where appellant's counsel is diligent, the Arizona appeal courts usually render speedy justice."

The meaning of such words as "average", "delayed", "concensus", "diligent", "usually" and "speedy" is not pre-

cise. An additional element of doubt is injected by the fact that much may depend upon the construction given the instruments filed, e.g., *In re Acosta*, 97 Ariz. 333, 400 P.2d 328, where a petitioner's application for habeas corpus was "treated as" a motion for permission to file a delayed appeal under Rule 16(a) of the Rules of the Supreme Court.

It is our conclusion that no one, either here or in Arizona, can say with any certainty how long it will take to exhaust Arizona's available procedures. It may be only a matter of months (no one asserts less) or a matter of years. In the meantime Petitioner is a convicted criminal and her degree of freedom, during the exhaustion period, is likewise problematical. Testimony was offered to the effect that under applicable Arizona rules (the trial court having determined that she was voluntarily absent, having ordered her arrest and having postponed sentencing until her return to Arizona) she will not be eligible for bail.[22] Such is our conclusion. But whether incarcerated, or on bail, she is subjected to restraint and supervision. Due to her conviction, in her in absentia trial, she will not have freedom of action enjoyed by a citizen not so beclouded. Of this phase of the case it is clear that she faces injury that is irreparable upon her return to Arizona.

It remains to consider remedy. Under the applicable statutes it is this Court's duty to dispose of the petitioner

---

[22] Rule 358, Arizona Rules of Criminal Procedure, provides in substance that, under these circumstances, a defendant will not be eligible for bail unless defendant has a proper excuse for having been in default of the previous bail, with respect to whether the Arizona court has heretofore found that Petitioner was voluntarily absent.

before us "as law and justice require."[23] We have no desire to make this state a haven for recalcitrant defendants. Petitioner should be fairly tried for her alleged offense. At the same time we are persuaded that her return to Arizona to face the certainty of sentence and the appeals following, bearing in mind that she must exhaust the state's remedies as a condition precedent for federal habeas corpus in Arizona, would subject her to irreparable harm. If we were forced to choose between avoidance of punishment entirely, no matter how richly deserved, and a deprivation of constitutional rights, we would choose, with Judge Bazelon,[24] the former. This is a matter of relative values. No scale is perfect, no dogma the true faith. But in my judgment the Bill of Rights requires no less than the elevation of the individual, no matter how miserable, over the competing demands of comity and the judicial deference known as federalism.

But we are forced upon no such Procrustean bed as between the choices above stated. For solution we turn to federal district court precedent in the international extradition cases. We gather their teachings to be that in such cases, where a foreign country seeks the return of one of its nationals after a trial in absentia, federal district courts have refused to acknowledge the judgment of conviction as of legal value and have treated the case as one in which criminal trial is still pending. Return is then authorized, solely for trial, and under the doctrine of international law controlling such extradition, the demanding sovereign must afford the defendant a complete trial on the original charges. This trial must meet the require-

---

[23] 28 U.S.C. §2243.

[24] Dissenting in *Johnson v. Matthews*, 182 F2d 677, 684 (CA D.C. 1950).

ments of international due process, and failure to so protect the rights of the defendant constitutes a breach of international law. *Gallina v. Fraser,* 177 F. Supp. 856 (D.C. Conn. 1959); *Ex parte La Mantia,* 206 Fed. 330 (D.C., S.D. N.Y. 1913); *Ex parte Fudera,* 162 Fed. 591 (C.C. S.D. N.Y. 1908).

Thus our ruling: With great deference to, and respect for the Courts of our sister state, if the State of Arizona certifies to this Court that the Petitioner can and will receive an expeditious trial under the Federal constitutionally applicable principles as hereinabove outlined, Petitioner's return upon a proper requisition will not be prevented by this Court upon the showings here made. Failing such certification and requisition within a reasonable time the writ shall be granted and the Petitioner's discharge ordered. The writ, as of today, is thus granted, conditioned as above, and the Petitioner shall be admitted to bail.

Under the view we have taken of this case we need not decide whether there has been independent Michigan state action, executive and judicial, depriving Petitioner of due process under the Fourteenth Amendment, because of Michigan's honoring of Arizona's demand, with knowledge that in so doing it was ratifying and confirming, implementing and lending its official aid to Arizona's efforts to sentence pursuant to a trial in absentia.

It is so ordered.

/s/ Talbot Smith
United States District Judge

A true copy:
Frederick W. Johnson, Clerk,
By: /s/ Pauline L. Ogden,
Deputy Clerk.

ORDER OF MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of September in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Theodore Souris, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

In the Matter of
Ernestine W. Hunt,
Petitioner. } No. 51,871

On order of the Court, the application for emergency leave to appeal is considered, and the same is Denied, because no sufficient reason appears why petitioner should not be returned to the demanding State of Arizona. The requests for further stay of extradition proceedings and for admission to bail are Denied. GCR 1963, 865.1(7).

O'Hara J., dissents.

Souris, J., dissents. I would grant this application for leave to appeal the Court of Appeals' denials of a stay of the executive rendition proceedings and of applicant's release on bail pending that Court's determination of her claim of appeal. Further, sua sponte, pursuant to GCR 1963, 853.2(4), I would reverse the Court of Appeals' order of August 29, 1967 and grant the relief requested by applicant pending the Court of Appeals' determination of her claim of appeal.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of September in the year of our Lord one thousand nine hundred and sixty-seven.

/s/ Donald F. Winters
Clerk.

(Seal)

ORDER OF MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Detroit, on the 29th day of August in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable T. John Lesinski, Presiding Judge; Charles L. Levin, Timothy C. Quinn, Judges.

In the Matter of
Ernestine W. Hunt,
Plaintiff. } No. 4030

In this cause a complaint for superintending control and a motion for bail are filed by plaintiff, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the complaint for superintending control be, and the same is hereby Dismissed.

It is Further Ordered that the motion for bail be, and the same is hereby Denied.

It is Further Ordered that the stay of proceedings entered by this Court on July 13, 1967 shall Terminate on September 7, 1967.

Judge Levin Dissenting:

I would continue the stay of the Governor's rendition warrant pending the appeal to this Court taken by the petitioner following the denial of her application for a writ of habeas corpus. Section 10 of the Uniform Criminal Extradition Act (9 U.L.A. 258) adopted by Michigan, CL 1948, §780.1 *et seq.* (Stat Ann 1954 Rev §28.1285[1]), provides that no person arrested upon a governor's warrant shall be delivered over to the agent of the demanding state until he shall have had an opportunity to test the legality of his arrest by applying for a writ of habeas corpus. In this case the writ was applied for and denied. The uniform act does not provide for appellate review of such denial. However, the petitioner in this case has filed a claim of appeal asserting that she enjoys a right of review pursuant to GCR 1963, 806.1.

Whether she enjoys a right of review or may only obtain review by application for leave to appeal, and whether the questions which she seeks to raise may properly be considered by either the trial court or by an appellate court are, I think, beside the point. Those questions are not before us. Until her appeal claimed as of right is dismissed, she has an appeal pending in this Court—until a panel of this Court determines that she does not have a right to appeal and that it would not grant leave to appeal we must, I believe, in considering her application for a stay, assume that she is properly here. If she is properly here, she is, in my opinion, entitled to a stay. There is no

showing that a delay in her rendition to the demanding state for the relatively short time required to consider a motion to dismiss her appeal or any application for leave to appeal she may promptly file, would prejudice the demanding state or the enforcement of its laws. It is obvious that unless she is granted a stay her appeal (claimed as of right) would be without further purpose.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 31st day of August in the year of our Lord one thousand nine hundred and sixty-seven.

/s/ Ronald L. Dzierbicki
Clerk

(Seal)

OPINION OF THE COURT

STATE OF MICHIGAN—In the Circuit Court for the County of Jackson

In the Matter of
Ernestine W. Hunt } Number: C6-136.

On May 25, 1967 Ernestine W. Hunt was arrested in the County of Jackson, City of Jackson, on a Governor's warrant for her extradition to the State of Arizona "to answer to the charge" of aggravated assault and battery.

Upon arraignment before the Jackson County Circuit Court Mrs. Hunt was granted bond in the amount of $2,000.00 and released to appear at a habeas corpus hearing on June 16, 1967. Hearing was held on June 16, 1967.

Through her attorneys, Mrs. Hunt has complained that the requisition documents lack regularity and were insufficient as to form and content and that she was tried and convicted in absentia within the State of Arizona on May 5, 1967, and that the Governor's warrant which is attached to the Answer and Return to Complaint in the writ of habeas corpus in these proceedings is, therefore, faulty on its face and that the proceedings in Arizona have so violated her constitutional rights that she should be discharged from custody.

Extradition is authorized only when one charged with crime in any state flees from its justice to another state, so that subjects of inquiry in a habeas corpus proceeding to test the validity of an extradition order against the petitioner are:

(1) Whether a crime has been substantially charged in the demanding state;

(2) Whether the petitioner is the person charged; and

(3) Whether she was in such state at the time of the crime.

(Fowler v. Ross, 196 Fed. 2d 25.)

In reviewing the testimony and exhibits in the instant case, I find that the petitioner has been substantially charged with a crime in the demanding state. The documents charge her with aggravated assault and battery on or about November 9, 1963 in Tucson, Pima County, Arizona. The crime charged is a felony in Arizona. The extradition proceedings were started prior to the petitioner's trial in absentia, therefore, the fact that the documents indicate that she is sought for the purpose of trial is not a fatal defect, in my opinion. She was being sought at the time the trial was conducted, from April 25 to May 5, 1967. She is now wanted for sentencing. I do not feel that this Court should hold that the documents do not properly conform because they have not been amended to indicate she is wanted for sentencing rather than trial. The petitioner was aware of the fact that she was wanted for trial as was indicated by a telegram from Dr. Gould to petitioner's counsel in Arizona dated March 1, 1967, wherein he stated:

> "Mrs. Ernestine W. Hunt is my patient in Mercywood Hospital. In my opinion it would be dangerous to her health to leave the Hospital and attempt to travel to Arizona."

I find, therefore, that a crime has been substantially charged in the demanding state and that the documents are in order.

The second question is whether the petitioner is the person charged.

Identity was stipulated to at the governor's hearing, however, it was not at the time the Court conducted its hearing. Deputy Sheriff Ben Mills Bernal of Pima County, Arizona, conclusively established identity by his testimony, and I, therefore, find that identity has been sufficiently proven.

The third question involved is whether the petitioner is a fugitive.

As was stated in *Moncrief v. Anderson,* 342 Fed. 2d 902:

> "Fugitivity means presence in the demanding state when the crime was allegedy committed."

There is no question in my mind but what the petitioner was in Arizona at the time the crime was committed. The testimony of Deputy Ben Mills Bernal establishes this.

The petitioner raises constitutional grounds as to why this Court should grant habeas corpus. She states that she has been tried in absentia and, therefore, has been denied the right to confront the witnesses against her, which violates the Sixth Amendment of the United States Constitution. (*Pointer v. Texas,* 380 U.S. 400.) Also, that such a trial violates the due process clause of the Fourteenth Amendment in that due process requires that the defendant be present at every stage of the proceedings against her. (*United States v. Shelton,* 6 Fed. 2d 897; *United States v. Hamrick,* 293 F. 2d 468 (4th Cir. 1961); *People v. Medcoff,* 344 Mich. 108.)

Petitioner further states that under Arizona Court Rules that she has no remedy but to be sentenced. She states that she is too late to get a new trial because more than three (3) days have elapsed since the verdict (Rule 308). That she would have to have newly-discovered evidence to get a new trial. She states that the rules do not require her to be present at her trial and the Arizona Supreme Court has upheld the constitutionality of trials in absentia, therefore, what redress is there for her.

The issue narrows down to whether this Court can consider the constitutional questions raised by the petitioner, or, is the Court restricted to considering the usual three elements only?

The petitioner has cited certain decisions from other states: *Foster v. Uttech,* 31 Wis 2d 513; *Commonwealth ex rel. Mattox v. Superintendent,* 152 Pa. Super 167, and *Application of Middlebrooks,* 88 Fed. Supp. 943.

On the other hand, the Attorney General cites *Sweeney v. Woodall,* 344 U.S. 86.

In the *Sweeney* case the demanding state was Alabama and the asylum state was Ohio. As stated at page 89:

> "By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend

against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned."

It is my opinion that the *Sweeney* case has not been overruled, although the other cases cited by petitioner would seem to give this Court latitude to consider constitutional questions in addition to the usual elements considered in extradition proceedings.

I do not believe, however, that this Court should consider the constitutional questions raised unless the petitioner is without recourse to do so in Arizona.

The petitioner still has available to her the appellate procedure in Arizona.

It is true, as counsel states, that the Arizona Supreme Court has ruled trials in absentia to be constitutional, but this does not mean that the Supreme Court of Arizona could not overrule its prior decision upon a forceful showing, as was presented in this Court, that such trials are unconstitutional.

There is also no reason for this Court to conclude that she could not get reasonable bail pending appellate proceedings in Arizona.

I find, therefore, that this petitioner should test the claimed unconstitutionality of her in-absentia trial in the State of Arizona and by the Courts of that State.

This Court, as a State Circuit Court, does not choose to pass upon the constitutionality of the laws of the State of Arizona when not convinced that the petitioner does not have an adequate remedy in Arizona.

It is the decision of this Court that these proceedings under writ of habeas corpus are hereby dismissed, and I further order that the petitioner, Ernestine W. Hunt, be promptly and justly returned to the State of Arizona for sentencing. In the meantime, pending arrival of the Arizona authorities, she is remanded to the Jackson County jail without bond.

Signed: Charles J. Falahee,
Circuit Judge

Date: July 13, 1967.

APPENDIX B

U. S. CONSTITUTION

Article 4

Section 2, Clause 2. Extradition

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U. S. CONSTITUTION

Section 1 of Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transactions which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided

in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., §2403.

UNITED STATES CODE ANNOTATED

Title 18

Federal Rules of Criminal Procedure

Rule 43. Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

§2243. *Issuance of writ; return; hearing; decision*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

ARIZONA RULES OF CRIMINAL PROCEDURE

RULE 231. Proceedings at which presence of defendant required in felony prosecution; exception

A. In a prosecution for a felony the defendant shall be present:

1. At arraignment.

2. When a plea of guilty is made.

3. At the calling, examination, challenging, impaneling and swearing of the jury.

4. At all proceedings before the court when the jury is present.

5. When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.

6. At a view by the jury.

7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this Rule, except those in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders.

RULE 250. Examination of defendant's mental condition prior to or during trial; proceeding with trial or commitment of defendant to institution

A. If before or during the trial the court has reasonable ground to believe that the defendant, against whom an indictment has been found or information filed, is insane or mentally defective, to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately set a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

B. If the court, after the hearing, decides that the defendant is able to understand the proceedings and to assist in his defense it shall proceed with the trial. If it decides that the defendant through insanity or mental deficiency is not able to understand the proceedings or to assist in his defense, it shall have the defendant committed to the institution authorized to receive him, and the commitment of the defendant shall exonerate his bail. If thereafter the authorized officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report such fact to the court which conducted the hearing. If the officer so reports, the court shall proceed with the trial, and may again admit the defendant to bail, if he is bailable.

MICHIGAN COMPILED LAWS ANNOTATED CODE OF CRIMINAL PROCEDURE

780.4 Investigation by governor

Sec. 4. Governor may investigate case. When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

MICHIGAN COMPILED LAWS ANNOTATED CODE OF CRIMINAL PROCEDURE

780.9 Rights of accused persons; application for writ of habeas corpus

Sec. 9. Rights of accused person; application for writ of habeas corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied

for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 14 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 244

ERNESTINE W. HUNT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GARY K. NELSON
The Attorney General
of the State of Arizona

CARL WAAG
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

Attorneys for Respondent.

INDEX

	Page
OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	
I	4
II	6
III	8
IV	10
CONCLUSION	12

CASES AND AUTHORITIES CITED

Case	Page
Bruton v. United States 391 U.S. 123 (1968)	5
Diaz v. United States 223 U.S. 442 (1912)	7
Pointer v. Texas 380 U.S. 400 (1965)	5
Snyder v. Massachusetts 291 U.S. 97 (1934)	5
Sweeney v. Woodall 344 U.S. 86 (1952)	9

Statutes and Authorities

Arizona Rules of Criminal Procedure Rule 231 B	4,7
Federal Criminal Rule 43	8

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1530 Misc.

ERNESTINE W. HUNT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

THE STATE OF ARIZONA, by its Attorney General, GARY K. NELSON, by his assistant CARL WAAG, pursuant to Rule 24, Rules of the Supreme Court, 28 U.S.C., responds to the Petition for Writ of Certiorari heretofore filed.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's presentation of the above referenced matters in his petition.

QUESTIONS PRESENTED FOR REVIEW

1. The question is not, as stated by the petitioner, whether one is accorded due process of law if a federal district court must deny habeas corpus in all cases of a person tried in absentia. Nor is it true, as petitioner's statement of the question implies, that petitioner herein is ineligible for bail. She may be denied bail as a fugitive, but bail remains discretionary with the Court. The question is rather whether a state statute authorizing a criminal felony trial of a person who is

contumaciously absent from the state in violation of that person's undertaking and promise to attend trial is in conflict with the due process clause of the Fourteenth Amendment.

2. The record does present the third question petitioner claims it presents, but the facts on which she argues that question are not as she states them at page 20 of her petition. The State of Arizona had no knowledge that the Attorney General of Michigan was abandoning the appeal until the day the State of Arizona sought to intervene.

STATEMENT OF THE CASE

The decision of the Circuit Court states the case correctly, and that statement is adopted.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

The Arizona Rule of Criminal Procedure 231B, permitting trial in absentia of a felony defendant voluntarily absent throughout the proceedings, does not differ constitutionally from Federal Criminal Rule 43. The Federal Rule penalizes an accused who absents himself from his trial by requiring a forfeiture of his right of confrontation, his right to assist his counsel so as to make that counsel more effective, and his right to cross-examination to precisely the same extent as does the Arizona Rule. Such penalty by forfeiture of those rights has been approved by this Court in the promulgation of the Federal Rule. The only difference between the two rules is the fact that

the Federal Rule imposes the forfeiture only on a defendant who has been present at his trial and subsequently absents himself, where the Arizona Rule applies to one who absents himself voluntarily without reference to earlier attendance.

The State of Arizona does not question the petitioner's right to be present at her trial, per Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); nor her right to cross examination, per Pointer v. Texas, 380 U.S. 400 (1965); nor the right of confrontation, per Bruton v. United States, 391 U.S. 123 (1968). The State of Arizona did everything in its power to bring the petitioner before its court where she could be afforded due process. It is petitioner who absolutely refused to come to her trial, although it

was frequently continued at her request and for her convenience. It is petitioner's position that she may flaunt the authority of the State of Arizona and set its writ at naught; that the State of Arizona is without power to penalize her for so doing. Were this Court to promulgate a rule holding the State of Arizona so impotent, the State of Arizona could never again admit an accused to bail and reasonably anticipate seeing that accused in its court at the appointed time.

II

Petitioner's argument assumes the right on the part of an accused who has undertaken to attend his trial at a date set by the court to absent himself from the trial and defy the writ of the court issued to

secure his attendance. If petitioner is without such a right, then Arizona's Rule No. 231B, Rules of Criminal Procedure, deprives petitioner of nothing. It penalizes an accused for such behavior by forfeiture of certain of his rights which he cannot exercise while absent from the court, by permitting the judicial process to proceed in orderly fashion in his absence. This Court has upheld the power of the judiciary to impose such sanctions by the promulgation of Rule 43, Federal Rules of Criminal Procedure. See, Diaz v. United States, 223 U.S. 442 (1912).

A decision of this Court, reversing the Court of Appeals and upholding the District Court would necessarily be based on a holding that a federal trial may be

conducted in the absence of the accused, pursuant to Federal Criminal Rule No. 43, but that the Constitution forbids a state court to impose the same sanction for the same reason.

III

Petitioner argues the question on the premise that as to "* * * the underlying conviction * * * there is no question of its invalidity." (Petition for Writ of Certiorari, p. 13) The State of Arizona will concede that if there were no question of the validity of the petitioner's conviction, if she had been present at her trial and if Arizona had excluded her from the courtroon, prevented her from consulting her attorney, and deprived her of the right of confrontation and of cross examination, petitioner's arguments would be valid

and Sweeney v. Woodall, 344 U.S. 86 (1952) should not preclude the Circuit Court for Jackson County, Michigan, nor the District Court, from effecting her release. It is most unlikely, however, that under such circumstances the matter would ever reach the Circuit Court of Jackson County, Michigan, because it is rather unlikely that the Governor of Michigan would have issued his warrant for petitioner's arrest under such circumstances, or that the Attorney General of Arizona would have approved the Arizona Governor's unlikely request for rendition. The instant case is no proper vehicle for this Court's re-consideration of the rule of Sweeney v. Woodall, supra.

IV

The fact that, as petitioner believes, this is the only case on record in which the demanding state has been permitted to intervene in federal habeas corpus proceeding, is the natural result of the fact that it is the only case on record where the nominal respondent abandoned his right to appeal leaving the real party in interest, the government of a state, impotent to test the validity of an unprecedented ruling.

Petitioner argues her cause on a misstatement of the facts when she says "* * * Arizona authorities were aware for some time, through their participation as amicus, that the State of Michigan might not appeal, yet they deferred action until after expiration of the time for submission of the motion

under District Court rules."

The facts of the situation are as set forth in the opinion of the Court of Appeals, at pages 32 and 33 of the appendix to the petition. Arizona had no reason to believe that the nominal respondent would not appeal in the first instance, or that the Michigan Attorney General would decline to file the appeal documents on behalf of the real party in interest when the same were furnished to him for signature.

CONCLUSION

This Court should deny the petition for writ of certiorari herein and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

BEAUFORD JAMES GEORGE, JR
1133 Avenue of the Americas
New York, N.Y. 10036

CLARK SHANAHAN
310 W. Main Street
Owosso, Michigan 48867

this _____ day of August, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____ day of August, 1969.

_____

My commission expires: